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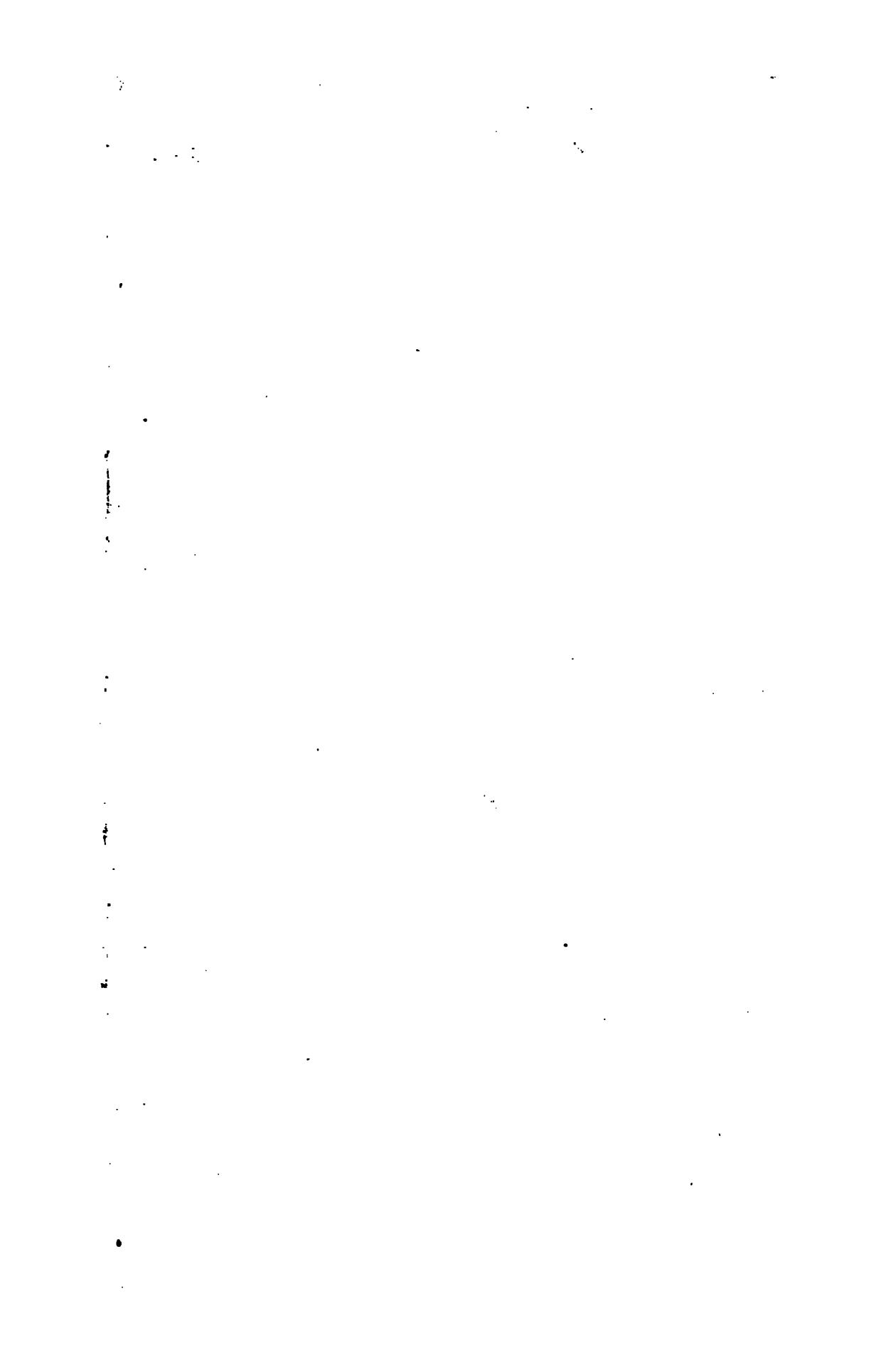
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MERCANTILE CASES.

Reports of Cases

RELATING TO

COMMERCE, MANUFACTURES,
&c. &c.

DETERMINED IN

THE COURTS OF COMMON LAW,
AT NISI PRIUS AND IN BANC,

IN

1828—1829.

WITH PRACTICAL NOTES.

BY
F. M. DANSON, ESQ., AND J. H. LLOYD, ESQ.
OF THE INNER TEMPLE, BARRISTERS AT LAW.



VOL. I.

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1830.



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J.H. 1828.

REPORTS OF MERCANTILE CASES.

LIABILITY OF CARRIERS.

1828.

GUILDHALL, March 4.—Before Lord TENTERDEN Ch. J.

BRADLEY v. WATERHOUSE and Others.

THIS was an action against the defendants, as carriers, for the loss of a parcel containing six pounds of tea and 200 sovereigns, sent by their coach from *London* to *Ashbourne*. It appeared in evidence, that the plaintiff, who was a banker at *Ashbourne*, was in the habit of receiving, by the defendant's coach, parcels containing sovereigns to an amount varying from 10,000*l.* to 20,000*l.* in the course of a year. That the defendants had in their office a board containing the usual notice for limiting their responsibility; that the plaintiff's agent in *London* was aware of this, but, nevertheless, always booked these parcels for the plaintiff without giving any intimation of their value, and had done so in the present instance. The parcel in question was an ordinary six pound tea-chest, in the inside of which were placed the 200 sovereigns, and the whole was covered with a common wrapper. The weight, of course, was considerable. Whilst the coach was stopping on the

Carriers who have limited their responsibility by notice, are not liable for a loss by the robbery of their own servants, where there has been great carelessness on the part of the owner, and no gross negligence on their part.

LIABILITY OF CARRIERS.

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road for the purpose of changing horses, the parcel was stolen, and, as it appeared by a subsequent conviction for the felony, by a porter employed by the defendants in the unloading of the coach and the delivery of parcels. It further appeared, that *Briggs*, one of the defendants, when applied to by the plaintiff, said, that any loss should be made good.

The *Solicitor-General*, for the plaintiff, contended, that carriers were in the nature of insurers; that though the law permitted them to limit their responsibility by a public notice, yet they were not thereby released from the consequences of their own negligence. That here the defendants had been guilty of negligence, in leaving the coach in the street without putting trusty persons to protect the property which they had undertaken to convey, and that at all events they were answerable for the acts of *their servants*, and must make good any peculation by them.

Sir James Scarlett, for the defendants, insisted that they were protected by the notice. That the plaintiff, being aware of this regulation, and not choosing to give a remuneration proportionate to the risk, had elected to be his own insurer, and could not, therefore, advance any claim against the defendants.

Lord TENTERDEN. The notice is not an absolute bar to the action. Gross negligence or a breach of duty on the part of the defendants would, in general, make them liable notwithstanding the notice. But in this case has there not been neglect on the part of the plaintiff? Has he not brought this loss upon himself by the imprudent manner of sending the parcel? Most people by handling it would discover that there was something in it besides tea, and he ought to have used

LIABILITY OF CARRIERS.

greater precaution to insure its safety. Negligence has been imputed to the defendants, and would be rightly so imputed, if the coach had been robbed whilst left in the street, no one being there on the part of the defendants to guard it; but it was not so robbed. It has been said that the defendants are responsible for the dishonesty of their porter; but no man can protect himself entirely against the fraud of his servants. If the defendants acted with ordinary caution, the notice will protect them. As to the acknowledgment made by *Briggs*, if it were made under a mistaken notion of his obligation in law, he will not be bound by it. And the only question therefore is, was there gross negligence on the part of the defendants, and has not the plaintiff acted so as to bring upon himself the loss?

Verdict for the defendants.

Carriers by the common law were somewhat harshly dealt with; they were not only compelled to carry for reasonable hire all goods, of whatever value, which were brought to them for that purpose, but they were also required to carry them safely: they were treated as insurers, and held liable for all losses, except such as happened by the act of God and the king's enemies. The reason of the rule is quaintly given by *Holt Ch. J. (a)*: "It is a hard thing," he says, "to charge a carrier; but if he should not be charged, he might keep a correspondence with thieves, and cheat the owner of his goods, and he should never be able to prove it." The hardship seems to have been early felt; for carriers have long been permitted to qualify their acceptance of goods by a condition, either limiting their responsibility to a particular sum, or divesting them of all liability in respect of goods exceeding a given value, unless a proportionate remuneration be given for the increased risk of insurance. (b)

1 T.R. 27.
5 T.R. 389.

Aleyn. 95.
Cartew. 485.
4 Burr. 2298.
1 H. Bl. 298.
4 East, 571.
5 East, 507.
and recognized in all
the subsequent cases.

(a) In *Lane v. Cotton*, Salk. 18.

(b) In the first case it is not considered as a part of the contract, *Clarke v. Gray and*
but merely matter of defence, which goes in reduction of the da-

LIABILITY OF CARRIERS.

1828.

~~Bradley~~

~~Warranhouse.~~

4 Esp. N. P.

C. 177.

3 Bingh. 2.

2 Campb. 415.

5 Campb. 27.

1 Holt, N.P.

C. 517.

2 Stark. N.P.

C. 55. 279.

Per Lord

Ellenborough,

in *Lyon v.*

Mells, 5 East,

439.

This is usually effected by a public notice, either in the office of the carrier, or by advertisement, or both. It is necessary, however, that this should come to the knowledge of the persons who intrust their goods to him for carriage; for the assent of the owner must either be proved or inferred, else he will be presumed to have relied on the general liability of the carrier. The effect of the notice is to protect the carrier in "those cases where the law would otherwise have made him answer for the neglect of others, and for accidents which it might not be within the scope of ordinary care and caution to provide against;" but it does not release him from the consequences of gross negligence or misfeasance. Instances of the latter are, where the carrier, without the consent of the owner, sends the goods by a conveyance different from that which was agreed upon, and not under the management of the same parties (a), or does not forward them at all (b), or sends them beyond the place of their destination. (c) Examples of the former are, knowingly suffering the

Others,

6 East, 564.

Latham v.

Rutley, 2 B. &

C. 20.

mages; in the latter case it is construed as a special contract, and the plaintiff will be nonsuited for the variance of the proof from the declaration.

It has frequently been matter of complaint from the bench, that this indulgence to carriers was ever sanctioned by the courts. It has been considered as a violation of the common law, and a mischievous innovation. But it may be doubted whether either of these propositions is true. The obligation of the carrier was never more than this; that he should be bound to convey safely for *reasonable hire*. What is a reasonable compensation depends upon the trouble and expence, which varies of course with the risk, and that with the value of the goods. He has a right, therefore, at common law, to apportion the charge accordingly. What the mischief of such a practice can be, it is difficult to conceive. If you wish to insure your goods, you may do so by paying a reasonable price. It would be very unjust to make a carrier for the sum of 5*s.* answerable for a parcel worth 10,000*l.* On such terms there would soon be no carriers at all.

(a) *Garnet v. Willan*, 5 B. & A. 55. *Sleat v. Fagg*, 5 B. & A. 342. It is the substitution of another carrier, and the divesting themselves of their contract, which distinguishes these cases from that of *Nicholson v. Willan*, 5 East, 507. where the defendant was proprietor of both conveyances.

(b) Per Bayley J. in *Garnet v. Willan*, 61.

(c) *Ettis v. Turner*, 8 T. R. 551. *Bodenham v. Bennett*, 4 Price, 51.

LIABILITY OF CARRIERS.

5.

goods to be damaged in the course of carriage (*a*) ; leaving the conveyance unprotected in the street, in consequence of which the goods are stolen (*b*) ; delivering them to a person not entitled to them, where there are circumstances which might have induced suspicion (*c*), or where no pains are taken to ascertain the right of the person applying (*d*) ; and other cases of the like kind. The question of negligence is entirely for the jury, and depends, of course, upon the circumstances of each case. It may, however, be laid down as a principle, that where the carrier has restricted his liability by notice, and no extra premium is paid upon the goods sent to him for conveyance (the owner being cognizant of the notice), the degree of care required from him is merely that which is prudent and necessary for the safe custody of articles of no greater worth than the sum to which his responsibility is limited (*e*) : and if there has been great neglect or imprudence on the part of the owner, as if there has been an attempt to conceal the real value by the inconsistent appearance of the parcel (*f*), or a misrepresentation of its actual worth (*g*), the question of negligence cannot arise at all. "It has been held," says Abbott Ch. J., "that a plaintiff shall not be allowed to complain of a negligent performance of the contract by the carrier, where that negligence has been occasioned by the plaintiff's own act, viz., by his treating the parcel as a thing of no value." (*h*) Formerly, indeed, there seems to have been an idea that, although the owner did not communicate to the carrier the value of the parcel, yet if it was impossible from its nature

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(*a*) *Beck v. Evans*, 16 East, 244. 3 Campb. 267.

(*b*) *Smith v. Horne*, 8 Taunt. 264. 2 B. Moore, 18.; and see *Batson v. Donovan*, 4 B. & A. 21.

(*c*) *Duff v. Budd*, 5 B. & B. 177.

(*d*) *Birkett v. Willan*, 2 B. & A. 556.

(*e*) See the opinion of Bayley J. in *Batson v. Donovan*, 4 B. & A. 34.

(*f*) *Gibbon v. Paynton*, 2 Burr. 2298. *Batson v. Donovan*.

(*g*) *Tyly v. Morrice*, Carthew, 485. In these cases the concealment was considered a *fraud* upon the carrier, and *ex dolo malo non vitetur actio*. The mere non-communication of the value is not, however, such a concealment as amounts to a fraud, putting an end to the contract altogether. Per Abbott Ch. J. in *Sheat v. Fagg*.

(*h*) *Westy v. Fagg*, 5 B. & A. 547.

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1828.

BRITANNIA
v.
WATERHOUSE

and appearance that he could be ignorant of the contents; he was bound, nevertheless, to use a degree of care proportioned to the value; but it is now settled that it is immaterial whether the carrier knew the value or not, and that it is the duty of the owner to inform him, and not incumbent upon him to make enquiries. (a) Upon the whole, the law as to the liability of carriers, and the extent of that liability, seems to be now fixed on a sound and reasonable basis. Few questions can henceforth be expected to arise, except as to the facts; upon the legal effect of these, when once ascertained, there can scarcely be much controversy.

(a). *Book v. Evans*, 3 Campb. 267. cor. Le Blanc J.; and see *Wilson v. Freeman*, 3 Campb. 327. (in which case, however, the carrier was expressly informed of the value, and told to charge what he pleased), and *Down v. Fromont*, 4 Campb. 40. *Marsh v. Horne*, 8 B. & C. 322. citing *Harris v. Packwood*, 5 Taunt. 264. and *Levi v. Waterhouse*, 1 Price, 280.

1828.

DELIVERY TO PURCHASER.

GUILDFHALL, April 16.—Before Lord TENTERDEN Ch. J.

ULLOCK, LANCASTER, and Co. v. REDDELEIN.

When goods are bought for export at a port from which goods are ordinarily shipped, if the seller sends them by land to a neighbouring port, he is liable for any loss which may take place up to the time of shipment from the latter port.

SPECIAL ASSUMPSIT on a contract to supply fine *Pouillac* claret suited to the *London* market.

The plaintiffs, merchants in *London*, had agreed with the defendant, a merchant at *Lubec*, to buy from him thirty-six hogsheads of the above wine, which he had recommended to them by letter from *Lubec*, as being "of the finest quality of *Pouillac* wine of 1822, and admirably suited to the *London* market." Upon this representation the plaintiffs ordered thirty-six hogsheads at the price fixed by the defendant, viz. 16*l.* per hogshead. Instead of being shipped direct from *Lubec*, as

it might have been, and as the plaintiffs expected it would be, it was sent by land to *Hamburg*, and shipped from thence to *London*. The *London Dock* cellars being full, it remained for a month after its arrival under a shed on the wharf, before it was deposited there. Soon afterwards it was found to be altogether unmarketable; and, after some correspondence on the subject between the plaintiffs and defendant, it was sold on account of the defendant, the price scarcely paying the charges upon it. (a) The question, therefore, was, whether, first, it had ever been wine of the quality represented; and, secondly, if so, at what time the deterioration had taken place, and whose loss it should be. Wine-brokers called on the part of the plaintiffs gave positive testimony that it had never been fine *Pouillac*, but was a very ordinary wine; whilst for the defendant, on the other hand, it was satisfactorily shewn to have been of the finest quality at the time of its leaving *Lubec*.

Lord TENTERDEN. If any accident happened to the wine whereby it was deteriorated, *after it was shipped at Hamburg*, the defendant must have a verdict, for he is not liable for a loss subsequent to the time of shipment. The defendant has proved in what state the wine was when it left *Lubec*; but he does not shew what became of it after it left *Lubec* for *Hamburg*, nor of what quality it was when put on board at *Hamburg*. The plaintiffs expected, as was natural, that it would be shipped direct from *Lubec*, and the carriage over-land therefore from thence to *Hamburg* was at the risk of the defendant. There was no delivery to the purchaser until the wine was put on board.

Verdict for plaintiffs.

(a) See *Hopkins v. Appleby*, 1 Stark. N. P. C. 477.

DELIVERY TO PURCHASER.

1828.~~Hanck~~~~Rutherford~~

The general rule is, that by delivery to a carrier, or on board a ship, the property of goods is vested in the purchaser, who is from thenceforth liable to all the risks of conveyance; and this, whether the carrier or vessel be named by the purchaser or not. (a) It seems, however, as well from the reason of the thing, as from an *obiter dictum* of Lord *Ellenborough* (b), and the present case, that the goods must be sent by the most direct and usual way, and that, until they are in *the due and regular course of delivery*, they continue at the risk of the seller.

(a) *Dawes v. Peck*, 8 T.R. 330. *Dutton v. Solomonson*, 3 B. & P. 584. *Cooke v. Ludlow*, 2 N.R. 119. *Groning and Another v. Mendham*, 5 M. & S. 189. *Brown and Others v. Hodgson*, 2 Campb. 56. *King and Another v. Meredith*, 2 Campb. 639. *Copeland v. Lewis*, 2 Stark. N.P.C. 53.

(b) In *Copeland v. Lewis*, 35. but see *Huxham v. Smith*, 2 Campb. 21.

INSURANCE.—REPAIRS OF SHIP.

GUILDHALL, April 17.—Before Lord TENTERDEN Ch. J. and a Special Jury.

FENWICK v. ROBINSON.

In determining whether a new ship is on her first or second voyage at the time of a loss, and, therefore, within the rule at Lloyd's for deducting one-third new for old: Held, that when the evidence as to the rule was contradictory,

ASSUMPSIT on a policy of insurance effected on the ship *Bolivar*, on a voyage from *Bristol* to *New York*, and back to *England*.

The *Bolivar* sailed from *Bristol* on the 2d of *August* 1826, for *New York*, where she arrived in safety. On her homeward voyage to *Liverpool* she was, on the 30th of *October* in the same year, driven on the *Mock-beggar*, and in consequence of the damage thereby sustained, was obliged to be repaired at considerable expence. For the amount of these repairs the plaintiff,

the terms of the charter-party and policy might be taken into consideration.

INSURANCE.—REPAIRS OF SHIP.

who was the owner of the ship, brought this action against the defendant, the secretary of the *Patriotic Irish Assurance Company*, and the only question at the trial was, whether the *Bolivar*, being *quite new* when she sailed from *Bristol*, the loss must be taken to have happened on her first voyage, or on her second, so as to be within the rule of *Lloyd's* for deducting one third new for old.

1828.

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Romney.

F. Pollock, for the plaintiff, contended that the insurers were not entitled to this deduction; that the homeward voyage was but a continuation of the voyage which commenced at *Bristol*; that the whole, taken together, was her first; that the policy spoke of the whole, out and home, as "*the voyage*"; that the charter-party also treated it as one voyage, for the words were, "To return to *London*, *Liverpool*, or *Bristol*, forty running days at *New York*, seventeen at her final port, and *so end her intended voyage*."

Sir *James Scarlett*, for the defendant, maintained that a ship's privilege was gone after she had made one voyage out to a foreign port; and he called several insurance-brokers, some of whom said that a vessel had made her first voyage when she had earned freight, or had been in a situation to earn it; others that a voyage from port to port was a first voyage within the rule, and stated that neither the policy nor the charter-party were in practice a criterion for determining the point.

Lord TENTERDEN. The question is, whether the insurers are to pay the whole of the repairs, or are entitled to a deduction of one third. There being no agreement of this kind in the policy, it is for the defendant, who seeks to limit its effect, and to charge the assured, to prove the custom which warrants him in

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doing so. It is a pity that this rule of deduction is not universal; but as it is not so, it becomes necessary to enquire whether this damage occurred on the first or second voyage. Now the witnesses called on the part of the defendant differed in their view of the general rule, and their evidence in this respect was contradictory. He is, however, bound to prove that this case falls within the rule of deduction. Under these circumstances, perhaps the charter-party or policy may rightly be taken into consideration for the sake of ascertaining whether the voyage out and home was all one adventure. And if you think it was so, you will find for the plaintiff for the whole amount.

Verdict for the plaintiff for the whole.

The rule of *Lloyd's*, which is very convenient, as determining in all cases what would else be a subject of very nice and difficult calculation, has been long established, and has received the recognition of the courts of law. (a) The question in this case was, What was a first voyage within that rule? And it is probable, that if the evidence of usage adduced on the part of the defendant had been uniform, the terms of the policy and charter-party would not have been suffered to control it. That such evidence is admissible has been established by many decisions. (b) The terms of the policy are in themselves sufficiently ambiguous to admit of explanation. Neither is it usual to construe them with the same strictness which is applied to written instruments in general. If this had been satisfactory, the charter-party,

(a) *Da Costa v. Neunham*, 2 T. R. 407. *Poingdestre v. The Royal Exchange Assurance*, 1 Ryan & Moody, 378.

(b) *Bond v. Gonsales*, 2 Salk. 445., per Holt C. J. *Tierney v. Ellerington*, cor. Lee C. J. 1 Burr. 548. *Pelly v. The Royal Exchange Assurance Company*, 1 Burr. 541. *Noble v. Kenneway*, Doug. 510. *Lyons v. Bridge*, Doug. 512. *Hoskins v. Pickeringill*, Marsh. 727. *Ougier v. Jennings*, cor. Eldon Ch. J. 1 Campb. 505. *Vallance v. Dewar*, 1 Campb. 503. *Palmer v. Blackburn*, 1 Bingh. 61.; and see *Gabay v. Lloyd*, 3 B. & C. 733.

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which is a matter altogether distinct from, and unconnected with, the insurance, could not have been allowed to affect it. It must be considered, therefore, as having, in this case, been called in aid in the absence of better and more direct proof.

1888.

Exhibit
to
Report.

INSURANCE.—INCEPTION OF VOYAGE INSURED.

GUILDFHALL, April 16.—Before Lord TENTERDEN Ch. J.

LORD and Another v. ROBINSON. (Same defendant.)

ACTION on a policy on the ship *Caroline*. The policy, as originally effected by the plaintiffs' agent in *London*, was on ship and outfit on a voyage from *Sidney, New South Wales*, to *Otaheite*, during her stay, and back. After the policy had been sent to *Ireland* for signature, and before its return, he received a letter from *Lord*, one of the owners resident in *Hobart's Town*, stating that the *Caroline* had sailed for *M'Quarrie Island*, on a fishing and sealing voyage, and was to return to *Hobart's Town*, and giving him directions to insure accordingly.

A policy from Sidney to Otaheite, with leave to call at M'Quarrie Island, and all other ports, for the purpose of South Sea fishing and sealing, does not cover a voyage for that purpose from Sidney to M'Quarrie Island, which is not in the course to Otaheite, in the absence of all proof of an intention to go to Otaheite.

This he immediately communicated to the agent of the insurance company, and insisted that the policy should be cancelled, unless altered so as to protect this latter voyage. The following words were accordingly inserted after "from *Sidney, New South Wales*, to *Otaheite*," viz. "with leave to call at *M'Quarrie Island*, and at all other ports for *South Sea* fishing and sealing." The question at the trial was, whether the ship had sailed on the voyage insured.

From the evidence of the first mate (for the captain being part-owner was incompetent) it appeared that she set sail from *Sidney* completely equipped for a *South Sea*.

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—
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—
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fishing and sealing voyage; that she went direct to *M'Quarrie Island* to furnish supplies to the men who had been left there on the preceding voyage, to take in whatever quantity of oil might have been provided by them, and if there were no sufficient cargo there, to proceed to the other *South Sea* islands; that whilst she was lying in one of the harbours of *M'Quarrie Island*, having on board about 150 tons of oil, and waiting for a fair wind, a gale came on, and she was wrecked.

There was no evidence of an intention to go to *Otaheite* at all; but, on the contrary, it appeared, from the cross-examination of the mate, that since 1820 the ship had made three voyages to *M'Quarrie Island*, and that on the voyage in question they took with them the usual quantity of gear; that the distance from *Sidney* to *M'Quarrie Island* is about 1600 miles; from *Sidney* to *Otaheite* about 2000 miles; and that the distance to *Otaheite* is greater from *M'Quarrie Island* than from *Sidney*; whereupon

Wilde Serjt., for the defendant, contended, that the plaintiffs had failed to prove their case; that the voyage insured was from *Sidney* to *Otaheite*, and thence back to *Sidney*. The voyage proved was, to *M'Quarrie Island* only; that it was plain there was no intention of going to *Otaheite* at all, *M'Quarrie Island* being further from that place than *Sidney*.

Sir James Scarlett, for the plaintiffs, submitted that there was at least an inception of the voyage insured, which was sufficient for the plaintiff's right against the insurers. That she set out on a fishing and sealing voyage to the *South Sea Islands* generally, intending to stop half-way on her course to *Otaheite* if she found sufficient cargo. That the question, therefore, was, Whether the calling at *M'Quarrie Island* was not connected with the voyage?

It was communicated to the insurers, that the vessel had commenced that part of her voyage which had reference to *M'Quarrie Island*, and it was, therefore, clearly within the contemplation of the policy that the vessel should proceed there.

Lord TENTERDEN. You do not prove that a voyage to *Otaheite* was ever contemplated.

Sir James Scarlett. The captain might have been going to *Otaheite*. There is nothing inconsistent with that supposition.

Lord TENTERDEN. I cannot presume that it was in the course of a voyage to *Otaheite* to go to *M'Quarrie Island*.

The plaintiffs were accordingly nonsuited.

In the following term *Scarlett* moved to set aside this nonsuit, on the ground that, although there was no direct proof of an intention to go to *Otaheite*, yet *Lord's* last letter was large enough to cover all the *South Sea Islands*. (a) That if the words in the policy might be considered as equivalent to the words "from *Sidney, New South Wales*, to *M'Quarrie Island or Otaheite*," this would be sufficient to protect a voyage to the former place. That the person who effected the policy must have known where *M'Quarrie Island* was, and that it was not in the direct course to *Otaheite*, and must have understood, therefore, that the ship was to go there at all events. By the terms, "liberty to call at *M'Quarrie Island*," a voyage from *Sidney* to that place must have

(a) See on this subject *Gairdner v. Senhouse*, 5 Taunt. 16. *Metcalfe v. Parry*, 4 Campb. 123. *Bragg v. Anderson*, 4 Taunt. 229. *Lambert v. Liddard*, 5 Taunt. 480.

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2 Str. 1249.
2 H. Bl. 545.

been contemplated, whatever might be the ulterior destination of the vessel. That if so, it was not essential, in order to recover on a policy, that the whole voyage insured should be completed. If the loss happened whilst the ship was in the due course of that voyage, it would be sufficient, even though there might have been an intention at some future point to deviate. *Heselton v. Allnutt.* (a)

Lord TENTERDEN. There was no intention of going to *Otaheite*. The last letter of *Lord* negatives any such supposition. To satisfy the words, "at and from *Sidney* to *Otaheite*," you must prove a voyage commenced either to *Otaheite* direct, or at least to *Otaheite* round by *M'Quarrie Island*. The plaintiff's agent, instead of having the word "*Otaheite*" struckout, and *M'Quarrie Island* substituted in its place, contents himself with adding the words, "leave to call at *M'Quarrie Island*."

Rule refused.

(a) 1 M. & S. 46.; and see *Hare v. Travis*, 7 H. & C. 14. S. P.

This was not the case of a deviation, but of a voyage different from the one insured. The distinction is well laid down by *Lord Mansfield* in *Woolridge v. Boydell.* (b) In all cases, the *termini* of the voyage intended, and those of the voyage described in the policy, must be the same. (c) Here the *termini* were *Sidney* and *Otaheite*. If it could have been proved or inferred that there was, at the commencement of the voyage, an intention to go to *Otaheite*, then, no doubt, the insurers would have been liable at first, and would have continued so, although that intention were subsequently abandoned, until an actual deviation had taken place; but here they were never liable at all.

(b) Doug. 18.

(c) Ibid. *Stott v. Vaughan*, cor. *Lord Kenyon*, Marsh. Ins. b. 1. c. 8. n. 2.

BILL TAKEN IN PAYMENT UNDER
SUSPICIOUS CIRCUMSTANCES.

1828.

GUILDHALL, April 19.—Before Lord TENTERDEN Ch. J.

SLATER and Others v. WEST.

ACTION by indorsees of a bill of exchange against the acceptor.

The plaintiffs, who are *Manchester warehousemen*, carrying on business in *King Street, Cheapside*, received the bill under the following circumstances: — A person, calling himself *Thomas Symes*, came to their warehouse, and said he was recommended to buy from them by one of their customers at *Taunton*, naming a person who occasionally dealt with them. Having selected goods to the amount of *56l. 2s.*, he gave in payment the bill in question, which was for *45l.* payable at two months, and accepted by the defendant; the remaining *11l. 2s.* he paid in cash, and directed the goods, which formed a large package, to be sent to the *Rose and French Horn* in *Wood Street*, which was not a booking-house for any public conveyance. The plaintiffs made enquiries as to the persons whose names were on the bill, and the result was satisfactory. Their porter delivered the goods to the person calling himself *Thomas Symes*, at the *Rose and French Horn*, and the plaintiffs made no further enquiry till next morning, when they found that he had taken away the package soon after it was brought, having come to the public house a little before in order to receive it from the porter at the time appointed. In fact, *Symes* was a fictitious name. For the defendant, it was proved, that

Where a bill was taken in payment under circumstances of slight suspicion, and in an action by the holders against the acceptor, the jury found a verdict for the defendant, on the ground that the holders had not used due caution in taking the bill, the Court refused to disturb the verdict by granting a new trial.

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the bill was lost by the drawer's brother when going to get it discounted, and that the loss was advertised. There was no proof, however, of the plaintiffs having any knowledge of the advertisement.

Gurney for the defendant thereupon contended, that the plaintiffs, not having used due caution, could not make title to the bill, and he relied on the case of *Gill v. Cubitt* (a) as being expressly in point.

Lord TENTERDEN. If the bill was taken out of the ordinary course of business, and under circumstances which ought to have excited suspicion, the plaintiffs, though they have given full value for it, cannot recover against the present defendant. This doctrine is of modern date. I am the first Judge who decided a case of this kind. It is a subject to be considered with great care; for though, on the one hand, it is necessary for the purposes of trade to encourage a proper circulation of bills; yet, on the other, if too great a facility be given to the negotiating of these instruments, it operates as an encouragement to theft. The evidence to affect the plaintiffs must be confined to what took place at their warehouse; for their porter, even if he had suspicions, had no opportunity of communicating them to the plaintiffs. If you think that the directing the goods to be sent to such a house as that, ought to have excited suspicion, your verdict will be for the defendant, taking into view, however, Symes's remaining at the warehouse some time, and betraying no alarm or apprehension while there. This case is different from *Gill v. Cubitt*. There is a difference between taking a bill to be *discounted*, and giving a bill *for goods*. Here, perhaps, it was a little suspicious that the place

(a) 5 B. & C. 466.

to which the goods were directed to be sent was not a booking-office, and as it was near the warehouse of the plaintiffs, they might have enquired respecting the person who offered the bill.

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Verdict for the defendant.

In the following term *Brougham* moved for a new trial, on the ground that this verdict was against evidence. He contended, that the only circumstance which could have raised a possibility of suspicion in the minds of the plaintiffs was, that the *Rose and French Horn* was not a booking-house, and that this was much too slight to warrant the finding of the jury. There was nothing remarkable in ordering a package to be sent to such a house. The plaintiffs might suppose that the stranger had his lodging there, and they might reasonably conclude that he intended to take the goods with himself on his return to the country. But

THE COURT thought that the question had been fairly left to the jury, and that not only was it their province to decide on the facts, but, in a case like this, from their acquaintance with the regular course of business, they were most competent to form a correct judgment. Although, therefore, it was intimated that the Court would have been satisfied if the verdict had been otherwise, yet they refused to disturb it.

Rule refused.

This is certainly an extreme case, and it may be doubted whether another jury would be likely to arrive at the same conclusion. The plausible story told by the stranger, his unsuspicious manner, the reference which he gave, the purchasing of goods to a considerable amount, and the part payment in cash, were circumstances sufficient, one would think, to satisfy the doubts of the most cautious. The case

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8 Inst. 713.

of *Gill v. Cubitt* was, as Lord *Tenterden* justly remarked, widely different from the present: there, at an early hour in the morning, a bill was discounted for a person, whose name was unknown, without a single question being asked. That is *not*, or, at least, ought not to be, the usual course of any man's dealing; but to assimilate the present transaction to that case would be absurd. Lord *Tenterden* is anxious, and most rightly so, not to give a facility to the disposal of lost or stolen property so easily obtained, and, in general, so convertible into cash as these negotiable instruments; but it may be doubted whether a few verdicts like this would not oppose great impediments to the circulation of paper; a result which, in the present state of credit, is by no means desirable. Again, there is one disadvantage (as some evil seems inseparable from every change) in unsettling the principle which once obtained, that a holder for valuable consideration was entitled to recover, even though he had acquired the instrument from one who had obtained it dishonestly, so long as he was himself a stranger to that dishonesty (*a*); and the disadvantage is this,—that for a fixed rule, known to every one, there is substituted an uncertain one, varying according to the opinion of successive juries, whose views and means of information may be very different. Still, though it may be well to guard and limit a little more closely the application of it, the modern doctrine has not been introduced without good reason, and is consonant with that wise and ancient regulation of our law, which, on the one hand, for the encouragement of trade declares, that possession is *prima facie* evidence of ownership, and that when goods are sold in open day, and in open market, for a fair price, the buyer shall keep them even against the lawful owner, from whom they may have been stolen; and, on the other hand, for the prevention of theft, does not allow property to be transferred by sales conducted in a clandestine manner, and under suspicious circumstances.

(*a*) *Lawson v. Weston*, 4 Esp. 56., and see *Burr.* 452. 1516., and *Doug.* 611.

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LIEN OF PAWNEE UNDER THE FACTOR'S ACT.

1828.

In the KING'S BENCH.—*Easter Term.*

Ross and Others v. WILLIS and Others.

TROVER for *East India* warrants. This was one of several actions, arising out of the bankruptcy of *Fennel and Son*, extensive brokers in *London*. They had been employed as factors by the plaintiffs, who carried on business at *Perth*. In 1825 consignments of *East India* produce were made, on behalf of the plaintiffs to *Fennel and Son*, who obtained thereon, in the usual course, the warrants, which were the subject of the present action. These warrants do not, upon the face of them, contain any notification who is the real owner of the goods. The defendants (Messrs. *Willis* and Co.) were the bankers of *Fennel and Son*, who, having over-drawn their account, deposited at various times, in the months of *October, November, and December, 1825*, the warrants in question, among others, as a collateral security. On the 14th *October 1826*, a bill for 10,000*l.*, on which *Fennel and Son* were liable to the bankers, becoming due; and they being unable to take it up, another bill was drawn for the same amount, discounted by the bankers, and placed to the credit of *Fennel and Son*, who were debited with the bill due. (a) The defendants

A factor, before the 1st October 1826, pledged E. I. warrants with a banker as a security. A substitution of new bills for old took place between the factor and banker after the 1st October, and the latter claimed to retain the warrants as a security for a bill of 10,000*l.* then discounted for the factor, the cash being placed to the account of the factor: Held, that this transaction was not within the second section of the 6 G. 4. c. 94., which came into operation on the 1st October 1826.

(a) It is a general practice with bankers, when a customer has over-drawn his account, to take his promissory note or bill. This they discount with the usual premium, but instead of paying over the cash, they merely place it to his credit in account. When the bill or note is due, the same operation is repeated. The customer has credit for the cash (deducting discount) upon the new note or bill, and is debited with the one due.

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v.
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claimed to retain the warrants for this sum, and on the trial at *Guildhall*, before Lord *Tenterden*, at the sittings before *Easter* term, several points were raised by the Solicitor-General on behalf of the defendants, of which the only material one was the following. It was contended that this case fell within the operation of the second section of the factor's act (6 G. 4. c. 94. s. 2.) (a), and that the defendants, therefore, had a lien upon the warrants. This clause of the act came into operation on the 1st *October* 1826, and Lord *Tenterden* being of opinion that the pledge here was made before that day, and that the subsequent transactions between *Fennel* and Son and the defendants were merely a continuation of former securities, the plaintiffs recovered a verdict.

The *Solicitor-General* now moved for a new trial, on the same ground as that taken at *Nisi Prius*, and contended, that the words of the second section of the act applied to a trust and a possession existing on or after the 1st *October* 1826, no matter when originally commencing. Secondly, that actual manual possession was not necessary, and that, as between principal and factor, the possession of the bankers was constructively the possession of the factors. That there was, therefore, in this case a possession of the warrants by the factors, and a possession after the 1st *October*. That the pledging also took place after this date, for on the 14th *October*

(a) By this section it is in substance enacted, that from and after the 1st *October* 1826, any person *intrusted with and in possession* of any bill of lading, or other document for the delivery of goods, shall be deemed to be the true owner of the goods described in the several documents, so far as to give validity to any contract entered into by the person so possessed, for the sale or *deposit* of the said goods, or any part thereof, as a security for *money advanced* upon the faith of such said several documents: provided that the pledgee has not notice by such documents or otherwise, that the person pledging is not the actual *bond fide* owner of the goods.

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1826, the bankers advanced the factors 10,000*L*, and it was for this advance that the warrants were taken as a security. There could be no doubt that if the bankers had at that time delivered up the warrants to the factors, and they had immediately handed them back, such a case would have been within the very letter of the statute; then this mere form and machinery was all that was wanting here, and the Court ought to give effect to the spirit of the act, and hold this transaction to be protected by it.

1826.

Read

Writ

BAILEY J. It seems to me that Messrs. *Willis* and Co. are not entitled to retain these warrants under the 6*G. 4.* It appears from the words of the second section, that the party pledging must have the goods in his possession on or after the 1st *October* 1826. Here the factors have not possession of them at that time. They had been pledged long before with Messrs. *Willis* and Co. as a security for advances made by them for the factors. In the first place, then, the party cannot be deemed to have had, on or after the 1st *October*, such a possession as is required by the act. In the second place, there is no new pledging after that date. It is true there was a bill discounted by the bankers for *Fennel* and Son on the 14th *October*; but this was merely a substitution of new paper for the old in respect of a transaction which commenced the year before. If the bankers had then or before given up the actual and unconditional possession of the warrants to the factors, and they had been again pledged, there would be something in the argument; but this was not done, and it is an attempt, therefore, to make the act available for a pledge made before it came into operation.

HOLROYD J. I took upon the transaction on the 14th *October* as a mere renewal of the former securities.

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LITTLEDALE J. concurred.

Lord TENTERDEN. I do not consider what was done with respect to this bill a new agreement.

Rule refused.

It seems from the language of Lord *Tenterden* that, even if the pledging had taken place after the 1st, which was the case put by the Solicitor-General, yet, as it would have been in security, not for *advances* subsequently made, but for a *pre-existing debt*, the case would still not have fallen within this clause. He considered the transaction on the 14th *October*, not as the creation of a new debt, but the mere substitution of effectual securities in the place of those which were defunct.

The following Case, upon the same statute, was tried at the sittings after *Easter* term, before *BEST Ch. J.* at *GUILDHALL*.

BLANDY v. ALLAN.

Where a factor, under acceptances for his principal, which were provided for by the latter before they became due, pledged documents for the delivery of goods belonging to his principal, as a security for advances:

TROVER for ten pipes of wine.
The facts as they appeared in evidence were these: the plaintiff, a merchant residing in *Madeira*, had been in the habit of sending wines to this country for sale, and had employed one *Mitchell* as his factor to dispose of them. The transactions between the plaintiff and *Mitchell* were considerable, the plaintiff drawing bills upon *Mitchell*, and remitting him bills from *Madeira* to meet his acceptances on plaintiff's account. In the month of *January* 1826, *Mitchell* was in possession of

Held: that the pledgee had no right, under the second section of 4 G. 4. c. 83, and the fifth section of 6 G. 4. c. 94., to retain them against the owner.

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the dock warrants for seventy or eighty pipes of the plaintiff's wines, and on the 16th of that month, being in embarrassed circumstances, he deposited in the defendant's hands, as a security for an advance made to him of 149*l.*, the warrants for the ten pipes for which this action was brought. At this time *Mitchell* was under acceptances for the plaintiff to the amount of 2400*l.*, upon which the account stood against the plaintiff for 2050*l.*, though on that day the *cash* balance was 1400*l.* in his favour. It further appeared, that the plaintiff never failed in sending funds to meet *Mitchell's* acceptances before they became due, and that at the time of his bankruptcy, which took place shortly afterwards, *Mitchell* was 2000*l.* in his debt. The money obtained by *Mitchell* on the warrants was, in fact, applied to take up in part one of his acceptances for the plaintiff which fell due on the same day. The defendant knew that *Mitchell* had considerable transactions with the plaintiff, but was not informed by *Mitchell* of the precise nature of them, or that the wine in question was not his own. On the face of the dock warrants the wine purported to be imported by *Mitchell*. Up to the time of *Mitchell's* bankruptcy, the plaintiff was ignorant of his having pledged the warrants with the defendant, or of his having borrowed any money upon them.

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Upon this state of facts, *Spankie Serjt.* and *Patteson* for the defendant contended, that the pledging of these warrants by *Mitchell* was protected by the 4 G. 4. c. 83. particularly by the second section of that act, and by the third and fifth sections of the 6 G. 4. c. 94. (a); that at

(a) The second section 4 G. 4. c. 83. enacts, "that it shall be lawful to and for any person or persons, body or bodies politic or corporate, to accept or take any goods, wares, or merchandise, or the bill or bills of lading for the delivery thereof, in deposit or pledge,

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the time when *Mitchell* pledged the warrants, he had a lien upon them for the liabilities he was under for his principal; that that lien was transferred to the defendant,

from any consignee or consignees thereof; but then and in that case such person or persons, body or bodies politic or corporate, shall acquire no further right, title, or interest in or upon or to the said goods, wares, or merchandise, or any bill of lading thereto, which was possessed, or could or might have been enforced, by the said consignee or consignees at the time of such deposit or pledge as a security as aforesaid; but such person or persons, body or bodies politic or corporate, shall and may acquire, possess, and enforce such right, title, or interest as was possessed and might have been enforced by such consignee or consignees at the time of such deposit or pledge as aforesaid."

The third section 6 G. 4. c. 94. enacts, "that in case any person or persons, body or bodies politic or corporate, shall after the passing of this act accept and take any such goods, wares, or merchandise in deposit or pledge from any such person or persons so in possession and intrusted as aforesaid, without notice as aforesaid, as a security for any debt or demand due and owing from such person or persons so intrusted and in possession as aforesaid, to such person or persons, body or bodies politic or corporate, before the time of such deposit or pledge; then and in that case such person or persons, body or bodies politic or corporate, so accepting or taking such goods, wares, or merchandise in deposit or pledge, shall acquire no further or other right, title, or interest in or upon or to the said goods, wares, or merchandise, or any such document as aforesaid, than was possessed, or could or might have been enforced by the said person or persons so possessed and intrusted as aforesaid at the time of such deposit or pledge as a security as last aforesaid; but such person or persons, body or bodies politic or corporate, so accepting or taking such goods, wares, or merchandise in deposit or pledge, shall and may acquire, possess, and enforce such right, title, or interest as was possessed and might have been enforced by such person or persons so possessed and intrusted as aforesaid."

The fifth section enacts, "That from and after the passing of this act, it shall be lawful to and for any person or persons, body or bodies politic or corporate, to accept and take any such goods, wares, or merchandise as aforesaid, in deposit or pledge from any such factor or factors, agent or agents, notwithstanding such person or persons, body or bodies politic or corporate, shall have such notice as aforesaid, that the person or persons making such deposit or pledge is or are a factor or factors, agent or agents; but then and

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the pledgee, on his making the advance to *Mitchell*; and that the plaintiff could not recover the warrants without the repayment of the sum advanced upon them. Was the pawnee to be deprived of his lien, if the principal happened to pay off his debt to the factor? The pawnee's lien must be indefeasible by any subsequent transaction between the principal and the factor. The late enactments relating to factors were intended to enlarge the factor's power of transferring his lien, and ought not to receive a confined construction; otherwise the acts would have passed to little purpose, for that even before the change in the law, transfers in a certain degree were permitted; as, for instance, a pledgee might hold goods as the servant of the factor, and retain them against the principal for the lien of the factor.

This case was entirely distinguished from *Fletcher v. Heath* (a) : that was a case of a factor's general lien, this a case of special deposit. In the former case the

in that case such person or persons, body or bodies politic or corporate, shall acquire no further or other right, title, or interest in or upon or to the said goods, wares, or merchandise, or any such documents as aforesaid for the delivery thereof, than was possessed or could or might have been enforced by the said factor or factors, agent or agents at the time of such deposit or pledge as a security as last aforesaid; but such person or persons, body or bodies politic or corporate, shall and may acquire and possess and enforce such right, title, or interest as was possessed, and might have been enforced by such factor or factors, agent or agents, at the time of such deposit or pledge as aforesaid."

The case would now fall under the second section of the 6 G. 4. c. 94.; for the warrants did not contain any notification of the real owner; but that clause did not come into operation until the 1st of October 1826. The third section of the act did not apply to the case; for that is where the goods or documents are pledged for an antecedent debt of the factor. The fifth section was the only one properly applicable. It is somewhat singular that the 4 G. 4. c. 83. should remain unrepealed, when all its provisions have been incorporated into the 6 G. 4. c. 94.

(a) 7 B. & C. 517.

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facts shewed that *Billinge*, the broker, never had a lien; and in the report of that case by Messrs. *Manning* and *Ryland* (a), Lord *Tenterden*, in his judgment, refers to the eighth section (b) 6 G. 4., clearly showing that the Court considered that there was fraud in that case, and that no lien ever attached in *Billinge*.

Best C. J. It is clear, that by the common law factors had no right to pledge the goods of their principals; and I for one am very glad that that law has been altered. It always appeared extraordinary to me, that a person might put into the hands of another a document, holding the latter out to the world as the true owner, and that afterwards he might come forward, and claim it from a person who held it as a security for advances, and take it out of his possession, without payment of the money for which it was pledged. (c)

In looking at the acts, however, all that the third section of the 6 G. 4. does, is simply to transfer the whole right of the factor to his pledgee; and that right

(a) 1 Man. & Ryl. 335.

(b) The eighth section enacts, "That nothing herein contained shall extend, or be construed to extend, to subject any person or persons to prosecution for having deposited or pledged any goods, wares, or merchandise so intrusted or consigned to him, her, or them, provided the same shall not be made a security for, or subject to the payment of any greater sum or sums of money than at the time of such deposit or pledge was justly due and owing to such person or persons from his, her, or their principal or principals: provided nevertheless, that the acceptances of bills of exchange by such person or persons, drawn by or on account of such principal or principals, shall not be considered as constituting any part of such debt so due and owing from such principal or principals within the true intent and meaning of this act, so as to excuse the consequences of such deposit or pledge, unless such bills shall be paid when the same shall respectively become due."

(c) See the observations of the learned Chief Justice on this subject in *Williams v. Barton*, 3 Bingh. 139.

is defined in the same section to be "such a right, title, or interest as was possessed, and *might have been enforced* at the time of such pledge, by such person so possessed and intrusted as aforesaid."

This section goes a shade beyond the second section of the 4 G. 4. (a) If a factor is under liabilities for his principal, he has a right to retain his principal's goods in his possession, as a security until he is released from his liabilities; but he has *no right which he can then enforce*; he has no claim for the payment of money from his principal until he has paid money on his liabilities. The acts do not transfer a right to retain for a factor's liabilities for acceptances which the factor may never pay. Moreover, the eighth section 6 G. 4. shews that the liability of a factor meant an actual existing debt; for the former part of the section applies to money balances, not to mere liabilities; and indeed it would be most mischievous if a factor, under acceptances for his principal, could immediately pledge his principal's goods. The sections upon which the defendant's counsel rely apply to money claims, not to mere liabilities. It is a lien, but not such as to give a right to a pawnee.

Verdict for the plaintiff.

(a) The difference is the substitution of "factor or agent" for "consignee," and the extending the provision to a case where the pledgee has notice that the goods or documents are not the property of the person pledging them.

This decision is in its result unquestionably correct; but it may perhaps be permitted us, with great deference, to suggest a doubt as to some of the *data* on which it is grounded.

The learned Chief Justice intimates that by the sections of the act above quoted, the factor cannot transfer to a pledgee any right to retain against the owner, if, at the time

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of the pledge, he was merely under *liabilities* to his principal; and his reasons for this opinion are founded upon the words "such right, title, or interest as was possessed, and might have been enforced, by the factor at the time of the deposit." Now, the right in this case, he argues, is merely conditional, depending on the payment by the factor of the money for which he is liable on his acceptances: until this has been fulfilled, he has no right which he can enforce; by supposition, therefore, he has none such at the time of the deposit, and, consequently, can transfer none. He adds, that it would be mischievous to allow the factor such a power, and he must, therefore, suppose that if the lien could be transferred at all, it would be at once absolute and indefeasible in the pawnee.

But, with submission, it is apprehended that no such consequence would follow. The right of the factor, under the circumstances supposed, is by way of *indemnity*. Now this is a right which he can enforce against his principal at any time whilst that liability continues. To use the words of Lord Tenterden in *Fletcher v. Heath* (a): "If, in the result of the transaction, the factor discharged the bills out of his own funds, his right would be converted into a lien for money actually advanced. If, on the other hand, the bills were all discharged by the money of the owner, the right of the factor would cease and become void." This right, therefore, with these conditions, the factor transfers to the pawnee. Whatever claim the factor can set up against the owner, such, and to the same extent, can the pawnee also exercise. Now where, it may with deference be asked, is the mischief of this? It is merely requiring the owner to do an act of common honesty, as the condition of obtaining possession of his goods. It would be hard if, having made a settlement with his factor, under an ignorance of the pledging of his goods, he were, notwithstanding, prevented from obtaining possession of them. But it is not so: the

(a) It will be seen that we have followed the report of this case given by Messrs. Barnewall and Cresswell, and that the query thrown out by the Chief Justice at the conclusion of the argument is answered in the negative. The factor cannot transfer an *absolute* lien, but a *conditional* one he may.

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moment the factor's claim is satisfied, no one can withhold them from the owner under any claim derived from the factor. The hardship, if any, would seem rather to be upon the pledgee, who has advanced his money on the faith of goods, which, in consequence of an arrangement made behind his back between the principal and broker, he is no longer permitted to retain; but by the case supposed under the 5th section, he takes them with a knowledge that they are not the absolute property of the person pledging them, and he who voluntarily and knowingly subjects himself to a risk, has no right to complain of the consequence.

The policy of those enactments which permit factors to pledge the goods of their principals has been much questioned, and it is a matter of sufficient importance to justify a few observations in this place.

There are three several cases, the merits of each standing on distinct grounds: the first is, where goods or documents for the delivery of them are taken in pledge as a security *for advances, with a knowledge that they are not the property of the person pledging them.* By this transaction the person to whom they are pledged has the same right upon them which the factor could have enforced against the owner at the time of the deposit, or, in technical language, the factor's lien against his principal is transferred to the pawnee. The second is, where goods are pledged by the factor, *without notice* that they are the property of another, as a security for an *antecedent debt:* this pledge also gives the pawnee the same right as the last. The third is, where documents for the delivery of goods, not giving on the face of them any notification *who is the real owner* of the goods, are pledged by the holder as a security *for advances* made upon the faith of them; and in this case the pawnee has power given him by the statute to retain the documents so pledged, and by consequence the goods, until these advances are paid; in other words, he has an absolute lien upon them for the whole amount.

To the general policy of the two first, perhaps no sound objection can be urged. It seems but just that the factor should have power to avail himself beneficially of property of which he is intrusted with the possession, to the extent of his own claim against the owner. But the last case is one of much more questionable expediency. On the one hand,

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it may be said that such a power is necessary for the benefit of the merchant as well as the protection of the monied capitalist.

By the course of trade, property, and the documents which are the evidence of it, come into the hands of factors for the purposes of sale or consignment; and, though not the actual owners, yet for all the purposes of commerce they represent the owners. Now it frequently happens that they are for the time being unable to dispose of the goods advantageously, on account of the depressed state of the market, and that if they sell immediately, they must do so at great loss. In many cases, however, the principal draws on his factor bills, which he accepts, for nearly the amount which he calculates will be produced by the sale. The factor is thus placed in a very awkward situation: if he does not dispose of the goods, he has no funds to meet his acceptances; if he does, the principal sustains a severe loss. There is, however, a *mezzo termine*; by a temporary pledging of the goods a present supply might be obtained, and such a course would obviously be for the benefit of the owner. But the common law did not allow this; it was considered to be a departure from, or, at least, an exceeding of his authority, which was strictly and solely to *sell* the goods. The pledge, therefore, was altogether void as against the owner, who might at any moment defeat the security by reclaiming them. Under such circumstances few would be willing to make the necessary advances, and in this respect, therefore, the power introduced by the clause in question was beneficial to the owner. Again, factors frequently carry on business also as merchants on their own account, and bankers and monied men are in the habit of making large advances to them on the faith of goods in their possession. Now whether they are owners of these goods or merely intrusted with a temporary and limited control over them, in either case they hold documents which entitle them to the possession. How is the banker, then, to distinguish between that which is really their own, and that which they hold merely for another? He lends his money upon the faith of securities which he supposes to belong to his customer, and, as the law formerly stood, when the latter became insolvent, he found himself compelled to give them up to persons of whose right he was till then entirely ignorant.

This certainly seemed a hardship, and the legislature may have thought it reasonable that they rather should abide the loss who had placed their confidence in the factor, had constituted him their own representative, and enabled him to obtain credit for property not really his own, and not those who, without any fault of their own, had been deceived thereby.

To these arguments it may be replied, that if the clause was introduced for the benefit of the owners, it was founded upon a partial and mistaken view of the subject. The mischief, or, at all events, the hazard arising to them from the fraud or improvidence of the factor, the temptation which is thrown in his way, the possibility (by no means inconceivable) of a collusion between him and the money-lender (*a*), or, lastly, the accidents to which all are equally liable, far more than counterbalance the problematical advantage which might be derived from the change under circumstances of not very ordinary occurrence. But if, on the other hand, it was intended for the benefit of the bankers, it is intelligible enough. In the event of a factor's insolvency, the loss must fall on one party, and the question is, Whether it should fall on him to whom the goods really belong, or upon him who has, to say the least, inadvertently made advances on them. Now the owner is generally at a distance, and cannot watch over his own interest; he knows nothing of the proceedings of the factor, and is *obliged by the necessity of the case* to place in him an almost unlimited confidence. The banker, on the other hand, is for the most part aware that his customer carries on business as a factor, and when documents are offered him as

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(*a*) It is true, that severe penalties are attached by the statute to the misappropriation of the funds obtained by the pledge, and to other frauds of the factor; but, in the first place, it is easy to evade the act; and, in the second place, many cases suggest themselves where there would be much wrong on the part of the factor, and much loss sustained by the owner, to which the statute would not apply at all. It is by no means our intention in these remarks to derogate from the general character of factors, who are for the most part an upright and honourable body of men; but the temptation to prop a sinking credit, when the means are immediately at hand, who has magnanimity enough to resist?

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a security on advances, he may at all times easily ascertain, by calling for the invoices, &c., whether the property which they represent actually belongs to the factor or not. Add to this that the banker has, from the very nature of his dealings, the earliest information of the tottering circumstances of his customer. Goods may be consigned by the owner long after the banker is aware of the insolvency of the person to whom they are consigned. Which party then, it may be asked, requires the interposing protection of the law? Why this anxiety on behalf of men, than whom none, are more careful of their own interests when left to themselves? In short, the only object of this enactment seems to be to supersede the necessity of asking awkward questions, and thereby save the delicate feelings of the banker; and its only effect to give additional facilities to the obtaining of fictitious capital, and to hold out a bonus to imprudent adventure — to indemnify, when an insolvency takes place, the money-lender, who did know, or might have known, the security on which he lent, and to injure the merchant, who does not, and in general cannot, know the circumstances of the person whom he trusts. (a)

On the whole, this is, like most other practical questions, a contest of opposing disadvantages, or rather of opposing interests, in which it is not easy to adjust the balance. Whether the change has been generally beneficial, time alone can determine.

(a) This latter, it is believed, is the prevailing opinion among such of the profession as are best able to appreciate the relative merits of the question. But men in business are, after all, the best judges of these matters, and it was upon their solicitation that the act was obtained. How great a share the bankers might have had in this we profess not to know. To them the change is certainly *not prejudicial*.

PATENT.—SPECIFICATION.

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In the KING'S BENCH.—*Easter Term.*

CROMPTON v. IBBOTSON.

THIS was an action for the infringement of a patent obtained for an improved method of drying and finishing paper.

The specification contained these words:—“The invention consists in conducting paper, by means of a cloth or cloths, against a heated cylinder, which cloths may be made of any suitable material: but I prefer it to be made of linen warp and woollen weft, which cloth is shewn in the drawing by blue lines.” At the trial before Bayley J., at the last Lancaster assizes, a witness was called for the plaintiff, who admitted, that as to the conducting medium, he had tried several things; but he was not aware that any thing would answer the purpose, except the material which the patentee said he preferred; and, therefore, the learned Judge nonsuited the plaintiff, on the ground that his specification was uncertain, and that he ought not only to have stated what would do, but also to have excluded what would not do.

A specification of a patent contained these words—“which cloths may be made of any suitable material, but I prefer it to be made of linen warp or woollen weft,” the fact being, that no other material but this had been found to answer: Held, bad, as not being sufficiently accurate.

Brougham now moved to set aside this nonsuit, contending, that the important part of the invention did not consist in the material interposed, but in the mode of applying the paper to the cylinder. In the method before used the paper became cockled, probably for want of sufficient pressure. Here there was a screw which tightened it:—the gist of the invention was the conducting of the paper. Now this part was set out with great accuracy, and, as to the other, it was not so neces-

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sary. The Court had never yet gone so far as to say that every possible negation must be made in the specification. It was sufficient if it enabled another to avail himself of the invention without making further experiments.

Lord TENTERDEN. The patent was obtained for the discovery of a proper conducting medium. The plaintiff found, after repeated trials, that nothing would serve the purpose, except the cloth described in his specification; yet he says the cloth may be made of *any suitable* material, and merely that he *prefers* the particular kind there mentioned. Other persons, misled by the terms of this specification, may be induced to make experiments which the patentee knows must fail; and the public, therefore, has not the full and entire benefit of the invention,—the only ground on which the patent is obtained. In *Turner v. Winter* (a) a patent was held void, on the ground of an ambiguity in the specification like the present.

Rule refused.

(a) 1 T.R. 602. In that case *Ashurst* J. says: “It is incumbent on the patentee to give a specification of the invention in the clearest and most unequivocal terms of which the subject is capable; and if it appears that there is any unnecessary ambiguity affectedly introduced into the specification, or any thing which tends to mislead the public, in that case the patent is void.” And *Buller* J. adds: “If the patentee could only make the colour with two or three of the ingredients specified, and he *has inserted others which will not answer the purpose*, that will avoid the patent.” The observations of Chief Justice *Abbott*, in delivering judgment in the case of *The King v. Wheeler* (b), which came before the

(b) 2 B. & A. 349.

Court on a *sci. fa.* to repeal a patent, will be found valuable, as illustrating the principles of the law of patents. In the course of it he remarks, that “a specification which casts upon the public the expence and labour of experiment and trial, is undoubtedly bad.” Upon the whole, therefore, it is clear that unless the specification be so expressed that, at the expiration of the monopoly, the public may at once have the same benefit from the invention which the inventor himself had, the patent is void. Nor is there any hardship in this; monopolies in general are prejudicial to the public interest; the only purpose of granting them is to stimulate invention by holding out a bonus, not for the benefit of the individual, but for that of the public. If the inventor will not grant them this benefit, the reason for his monopoly at once ceases, and, therefore, the monopoly itself. And it should be recollectcd that in all these cases it is the fault of the patentee himself, who seeks unfairly to obtain all the advantage which the law bestows on a discovery useful to the community, and at the same time takes care that it shall be useful to no one but himself.

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AGREEMENT STAMP.

In the KING'S BENCH.—*Easter Term.*

TOOKE v. MEERING.

ASSUMPSIT for non-performance of contract.

On the 6th June 1827, an agreement in writing was entered into between plaintiff and defendant, by which the former undertook to sell and the latter to buy the ship *Betsey* for 700*l.*; 450*l.* to be paid in cash in one matter connected with the sale, does not render a stamp necessary. An agreement, therefore, for the sale of a ship, and *for procuring her to be chartered*, (the object of the parties being to earn freight in part payment of the price): Held, to be within the exemption in favour of agreements “for or relating to the sale of goods.”

Where the primary object of an agreement is the sale of goods, the introduction of other

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month, and the remaining 250*l.* to be secured by mortgage on the vessel. The defendant further agreed that a charter should be procured for the ship to *London*, and that on her arrival there the mortgage should be closed. For the breach of this last part of the contract the action was brought. An objection was taken to the admissibility of the agreement, on the ground that it ought to have had an agreement stamp. Lord *Tenterden*, however, being of opinion that, taken altogether, it was an agreement for the sale of goods, and therefore within the exception of the stamp act (55 G. 3. c. 184.), the plaintiff recovered a verdict.

Brougham now moved to enter a nonsuit, on the ground that the agreement was not admissible. It could not be construed as an agreement for the sale of goods, so as to fall within the exception of the stamp act: an agreement for the sale there meant an instrument selling. Where a contract executory was intended, different words were used. Besides, it was for the doing of two things distinct and independent. Though the first part might be within the exception, the latter clearly could not; and that it would be opening a door to fraud, and an entire evasion of the stamp acts, if to a contract which was exempt from the duty there might be appended another which was not so, and then both together might be treated as one. A stamp might become necessary to an instrument which of itself would not require it, by adding other matter; as in the case of a *cognovit*, with a condition to pay by instalments; *Reardon v. Swaby.* (a)

Lord TENTERDEN. If this is not an actual sale and transfer of the ship so as to fall within the provisions of

(a) 9 East, 135.

the register act 6 G. 4. c. 110., then it is an agreement for the sale of goods, and therefore within the exception of the stamp act. The ship is to be mortgaged. She is then to be chartered to *London*; then the freight earned on that voyage is to be applied to the payment of the remainder of the purchase-money. The agreement to procure a charter is therefore a part of the agreement for the price; the introduction of any thing immediately connected with the agreement does not render a stamp necessary.

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Rule refused.

The words of the act are, "any memorandum, letter, or agreement made for or relating to the sale of any goods, wares, or merchandise;" and it has been held, therefore, that an agreement to take a share of goods bought, and pay for them at a future time (*a*), and a receipt for the price of a horse, containing a warranty of soundness (*b*), come within the exception, and do not require an agreement stamp. It is necessary, however, that the primary object of the agreement should be the sale of goods; if it relate to such a sale incidentally only and collaterally, the stamp will not be dispensed with; such a case manifestly not being within the intention of the clause: therefore an agreement to provide for acceptances, if goods in the hands of the acceptor were not previously sold, was held to require a stamp. (*c*)

(*a*) *Venning v. Leckie*, 15 East, 7.

(*b*) *Skrine v. Elmore*, 2 Campb. 407.

(*c*) *Smith and Others v. Cator and Others*, 2 B. & A. 778. See further on this subject *Curry v. Edensor*, 3 T. R. 524. *Warrington v. Furber*, 8 E. R. 242. *Watkins v. Vince*, 2 Stark, N. P. C. 369.; and *Whitworth v. Crockett*, 2 Stark, N. P. C. 431.

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FOREIGN JUDGMENT.

In the KING'S BENCH.—*Easter Term.**HENLEY v. SOPER.*

Assumpsit
will lie on an
equitable
decree of a
colonial court.

ASSUMPSIT on a decree of the supreme court of *Newfoundland*. The defendant, who resided at *Plymouth*, had been engaged in a partnership concern with the plaintiff in *Newfoundland*. The firm was dissolved, and the plaintiff (the partner abroad) filed a bill of account against the defendant in the supreme court of the colony. The defendant's son, who had been sent out by him with a power of attorney "to act on his behalf," and "to appoint another if necessary," appeared to the process. Subsequently, the accounts were, with the consent of the plaintiff, submitted to arbitration, under an order of the Court, and a balance was awarded, in favour of the plaintiff, of 1000*l.* This award was set aside by the Court, and the arbitrators were directed to proceed *de novo*. On this second reference (to which the plaintiff gave no express assent) the balance was reduced to 608*l.*, whereupon the Court made a decree, ordering the defendant to pay that sum. Upon this decree an action of *assumpsit* was brought in *England*, and at the trial at *Exeter* the plaintiff recovered a verdict.

Wilde Serjt. now moved to have the verdict set aside and a nonsuit entered, on the ground, first, that *assumpsit* did not lie on a decree of a court of equity. That here the foundation of the decree was altogether equitable. Partnership accounts were not the proper subject of a debt or suit at law; they were peculiarly within

the province of a court of equity. In *Carpenter v. Thornton* (a) it was expressly decided, that an action at law could not be maintained upon a decree of a court of equity, for a sum of money founded on an equitable consideration.

Secondly, that the decree itself was informal and irregular; that the proper proceeding against the defendant would have been by attachment, for the non-performance of the award. The Court at *Newfoundland* could not adopt the award and make a decree thereon.

Thirdly, that even if the action would lie, a foreign judgment was but *evidence* of the debt. There must, therefore, be such a debt as would be a good consideration for a promise in law. Now here, the award upon which the decree was founded, fixing the balance, which constituted the consideration for the implied promise, if any, was made without authority from the defendant. The power of attorney given by him to his son was not produced at the trial. What, therefore, was the extent and limit of that authority did not appear. Granting that he had authority to submit to the first reference, it by no means followed that he had any for submitting to the second. By the first award of the arbitrators the authority conferred upon the agent was altogether determined. What he did, therefore, subsequently, with respect to the second reference, was entirely his own act, and could not bind the defendant, who had never assented to it. The balance, therefore, then awarded, did not constitute such a debt as would raise an implied promise on the part of the defendant to pay it.

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Lord TENTERDEN C.J. I think the plaintiff is entitled to recover in this action. There is a distinction between colonial decrees and those of a court of equity

(a) 3 B. & A. 32.

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in this country. In the first place, the colonial court has no power to enforce its decrees against persons living in *England*; an *English* court of equity has. There is, therefore, in the latter case, nothing to call for the interference of a court of common law, and it is, consequently, left to the court of equity, in general, to give effect to its own judgments. But this rule cannot be extended to the colonial courts, for their decrees would be altogether ineffectual, as against persons in *England*, unless the courts here interposed their authority to aid them.

In the second place, the judgments of a colonial court are not to be scanned with that nicety which is very properly required in those of our own courts. If they were, scarcely one judgment in a hundred would stand. It is the practice, I believe, of the privy council, to consider the substance and effect rather than the form of them; and it is right that we also should put a liberal construction upon them, and uphold them whenever it is possible. But a decree of a court of equity in this country may be carried into effect by a court of common law, where the subject matter of that decree is such as may of itself be the foundation of a proceeding at law. (a) Now, the subject of the decree in this case is not an open partnership account, but a fixed and definite sum, constituting a legal debt. Upon the ascertaining of that balance there immediately attaches an obligation on the part of the defendant to pay it; and on this consideration the law raises a promise to do so.

In the case of *Carpenter v. Thornton* the decree was for the specific performance of a contract, a matter, therefore, altogether equitable; and I there said, "If this were merely a bill filed for an account, and upon the balance a precise sum of money was found to be due, which

(a) See *Smith v. Whalley and Another*, 2 Bos. & Pul. 452.

might originally have formed the subject of an action at law, a court of law might, perhaps, in that case, lend its aid to enforce such a decree." Now this is exactly what the present case is. In *Sadler v. Robins* (*a*), Lord *Ellenborough*, speaking of a decree of the supreme court of *Jamaica*, says, "Had the decree been perfected I would have given effect to it as well as to a judgment at common law. The one may be the consideration of an *assumpsit* as well as the other."

As to the other point which has been pressed upon us, I am of opinion, that the second reference was under the authority of the defendant. He authorizes his son to act on his behalf, and to submit the matter to arbitration, in order to the final settlement of the partnership accounts. Now this authority may fairly be considered as abiding, until a good and effectual award is made. The accounts were certainly not settled until then. I think, therefore, that there was sufficient proof of authority; and if so, then there was a legal debt and a good consideration for the promise. On these grounds I am of opinion that the verdict ought to stand.

The other Judges (*b*) concurring, the
Rule was refused.

(*a*) 1 Campb. 255.

(*b*) Holroyd J. at first doubted whether there was sufficient proof of an authority from the defendant for submitting to the second reference, but ultimately assented to the opinion of the Lord Chief Justice.

Since the case of *Walker v. Witter* (*c*) it has been determined that a foreign judgment is merely *prima facie* evidence

(*c*) 1 Doug. 1.; and see the opinion of Mr. Justice Buller, in *Galbraith v. Neville*, 1 Doug. 5. n. (*s*), and 5 East, 475. n. (*i*), S. C.; and that of Chief Justice Eyre, in *Philips v. Hunter*, 2 H. Black. 410.

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of the debt *sought to be recovered in England*, and may be rebutted, therefore, by opposing proof; and where the proceedings in the foreign court, upon which the judgment is founded, have been such as are inconsistent with the general principles of justice, our courts will not enforce them. (a) In general, however, the judgment of a foreign court, of competent jurisdiction, directly upon a matter is conclusive as to that matter between the same parties; it is only where that sentence is sought to be enforced by the authority of the courts here, that they permit it to be drawn into question. (b) [See the case of *Kymer v. Larkin, post*, 74.]

(a) *Buchanan v. Rucker*, 1 Campb. 63., and 9 East, 192.

(b) 2 H. Black. 410. *Roach v. Garvan*, 1 Ves. 59. *Burrows v. Jenimo*, 2 Strange, 753.

RESCINDING OF CONTRACT.—STOPPAGE
IN TRANSITU.

In the COMMON PLEAS.—*Easter* term.

BARTRAM v. FAREBROTHER and WINCHESTER.

Notice to a wharfinger given in the name of the vendor, but by the direction of the vendee, who was insolvent, not to deliver goods, together with a subsequent assent to that act by the vendor, amounts to a rescinding of the sale, and revests the property in the vendor, at all events from the time of that assent.

THIS was an action of trover, brought by the plaintiff, a Scotch ale merchant, at Edinburgh, against the defendants, late sheriffs of Middlesex, to recover the value of thirty-eight hogsheads of ale, consigned to one *Mungo Park*. It was tried at Guildhall, on the 6th of July 1827, before Chief Justice *Best* and a common jury, when the following facts appeared in evidence:

In 1825, *Mungo Park* commenced business in London as a Scotch ale merchant, and consignments were made to him by the plaintiff on the faith of a letter written by

his uncle *Adam Park*. On the 9d of November 1826, *Mungo Park*, finding himself insolvent, and not wishing to involve the plaintiff, directed his attorney (Mr. *Vincent*) to adopt the best means he could for saving him. He informed him, at the same time, that twenty-five hogsheads had arrived on the 30th of the preceding month at the wharf of the *Leith and Berwick Company*, and that others might shortly be expected. *Vincent*, therefore, gave the wharfinger notice, in the name of the plaintiff, not to deliver either those which had actually arrived, or any which might thereafter come into his hands, consigned to *Mungo Park*. A letter was immediately written by *Vincent* to the plaintiff at *Edinburgh*, stating what had been done. It was answered by a letter from his clerk, dated the 6th, approving of and adopting the act of *Vincent*. This letter was not received in *London* till the 9th. The other thirteen hogsheads had arrived at the same wharf on the 4th.

On the 7th of November the officers of the defendants seized the whole of the hogsheads whilst in the possession of the wharfinger, under an execution at the suit of the uncle, *Adam Park*, founded on a warrant of attorney, which had been given to secure a sum advanced by him to his nephew. On this warrant judgment was entered up on the 5th. The goods were demanded at the sheriffs' office, by *Vincent*, on behalf of the plaintiff; but, being indemnified by the judgment creditor, the defendants refused to deliver them; whereupon this action was brought.

The Chief Justice being of opinion that at the time of the seizure the property had not vested in the vendee, the plaintiff recovered a verdict, and the defendants had liberty to move to set it aside, and enter a nonsuit.

Accordingly, in *Michaelmas* term last, *Wilde Serjt.* obtained a rule *nisi* on the ground, first, that when the goods arrived at the wharf, the *transitus* was determined;

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and, secondly, that *Vincent* had no authority to stop the goods; against which rule,

Cross and Jones Serjts. now shewed cause. Until actual delivery to the vendee, the contract was still open and executory, and might, therefore, by mutual consent be rescinded. The refusal of *Mungo Park* to accept the goods, and the subsequent adoption of this refusal by the plaintiff, amounted to such a renunciation of the contract as prevented the property from vesting in the vendee; *Atkin v. Barwick* (a), and *Salte and Another v. Field*. (b) At all events, there was a stoppage of the goods *in transitu*. The *transitus* was not at an end until either delivery had taken place, or some act of ownership had been exercised over them by the vendee, so as to give them a constructive possession, *Mills v. Ball*. (c) Here no such act had been done. *Vincent* was, for the purpose of the stoppage, agent of the plaintiff; for although he had in the first instance acted without authority from him, yet the subsequent recognition of that act amounted to an authority in law which had relation to and covered the act. The stoppage would, at least, be valid from the 6th, on which day the letter was written conveying the authority. From that time, therefore, the goods were revested in the vendor, and could not be seized under an execution issued against the vendee on the 7th.

Wilde Serjt. *contrd.* The contract was complete by the arrival of the goods, and could not afterwards be rescinded. They were at the place of their destination, and constructively in the possession of the vendee. But, independently of this, the vendee had no right, under the circumstances in which he was placed, to repudiate

(a) *Strange*, 165. (b) *S.T.R.* 211. (c) *2 B. & P.* 457.

the sale. It would be a very mischievous principle to allow a man on the brink of insolvency to select such of his creditors as he thought fit for preference, and by his own attorney to prevent the delivery of *their* goods to the injury of the rest. At all events, when the rights of third persons have intervened, the contract cannot be put an end to; *Smith v. Field* (a), *Barnes v. Freeland*. (b) Here the right of the judgment creditor had intervened; for the letter of the plaintiff, which adopted the acts of the vendee and his attorney, was not received till the 9th, whereas the goods were seized on the 7th. The act of the vendee was therefore a fraud upon the creditor. The reasoning of Chief Justice *Pratt* in *Atkin v. Barwick* is unsatisfactory, and the authority of that case consequently doubtful. *Salte v. Field* is distinguishable; for that was expressly decided on the ground that there never was any contract at all between the parties. But this notion of a rescinding of the contract is a mere afterthought. Neither the vendee nor his attorney contemplated any such thing. They intended what was done to operate as a stoppage *in transitu*, and at the trial it was put upon that ground, and that only. Now a stoppage *in transitu*, to be effectual, must be the act of the vendor, not that of the vendee or his agent. Here *Vincent* had no authority whatever from the vendor, and although he professed to act for him and in his name, in reality what he did was in consequence of directions from the vendee, whose attorney he was. The vendee neither has nor ought to have any such power. The notice, therefore, to the wharfinger was given by a *mere stranger*, and no subsequent adoption could confirm an act so entirely unauthorised. (c) Then there was in fact no valid authority to stop the goods *in transitu* until the

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(a) 5 T. R. 402. (b) 6 T. R. 80.

(c) So held in *Skiftin and Another v. Wray*, 6 East, 571.

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receipt of the plaintiff's letter on the 9th, and they were then in the custody of the sheriff under the execution.

BEST C. J. This is an action against the sheriffs for the value of certain goods taken possession of by them under an execution; and it is, in substance, a claim made by the original owner against the execution creditor. The question, therefore, now to be determined, is, whether at the time of the seizure the property of the goods in question was vested absolutely in the judgment debtor, to whom they had been sold.

By the contract of sale the property is changed; subject, however, to certain qualifications, one of which is, that, before it is completely executed, it may, by mutual consent, be rescinded. It is sufficient for the plaintiff's right, in this case, if the contract were suspended before the time of seizure, because this would prevent the property vesting absolutely in the vendee. But it is unnecessary now to consider this, because I go farther, and say, that here the contract was altogether put an end to before the seizure. What are the facts? *Mungo Park* had ordered certain goods from the plaintiff. Before they are delivered, he finds his circumstances in such a state, that he shall be unable to pay for them. He does, therefore, what, as an honest man, he ought to do. He endeavours to save the plaintiff from loss, and to release him from a bargain which must be injurious to him. To be sure, he takes rather an awkward way of doing it, for he requests his own attorney to give notice to the wharfinger not to deliver the goods. However, the effect is clearly this, that he declines to complete the contract by the acceptance of the goods, and, as far as is in him, repudiates and rescinds it. Information is then conveyed to the plaintiff at *Edinburgh* of what has been done on the part of the vendee, and an answer is written on the sixth,

adopting and confirming on his part this renunciation. This letter takes effect from the moment of writing it in *Edinburgh*. At that moment the plaintiff declares, that he no longer considers *Mungo Park* liable to him for the goods; that he is willing to take them back, and put an end to the bargain altogether. Every thing, therefore, which is necessary for rescinding the contract is then complete. (a) It is very true, as has been argued by my Brother *Wilde*, that if the rights of third persons had, in the mean time, intervened, there would be no longer a power of rescinding the contract. But here, no such right had intervened. *Mungo Park* was not a bankrupt. It is not therefore a question of fraudulent preference. It is not a matter affecting the interests of his general creditors. It is between the vendor of the goods and a judgment creditor, whose title was not complete until the day after the contract was, by the mutual act of the parties, extinguished, and the property re-vested in the vendor. Upon *principle*, therefore, I should have no difficulty in saying that the plaintiff is entitled to recover.

But we are not left without authorities on this subject. The first case in point of time is *Atkin v. Barwick*. That was an action of trover brought by the assignee of a bankrupt, for certain parcels of silk sold and sent off by the defendant to the bankrupt before his bankruptcy, and by him sent back to the defendant on discovering his insolvency. Judgment was given for the defendant, and though I may not perhaps approve of the reasons assigned by Chief Justice *Pratt*, yet I am of opinion that the decision was right. (b) The true

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(a) See *Adams and Others v. Lindsell and Another*, 1 B. & A. 681., where this was expressly determined.

(b) It has always been considered, that in that case the goods had never reached the warehouse of the vendee, although nothing of this is said in the report.

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principle of that decision, I apprehend, is given by Lord Kenyon in the case of *Salte v. Field*. The Chief Justice there says, that, "in that case the agreement of the parties to rescind the contract put an end to the sale, as if it had never taken place;" and it was upon the same principle, and on the authority of that case, that *Salte v. Field* was decided. The facts there were extremely like those of the present case. The goods were in the hands of the packer of the vendee for his use, and in his hands were attached by the vendee's creditors. Before any actual delivery to himself, he writes a letter, requesting his agent to return any goods which may have been delivered on his account, and to countermand all orders. This letter is afterwards shewn by the agent to the vendors, who assent, and under these circumstances it was considered, and rightly considered, that the contract was altogether rescinded, and that the plaintiffs, the vendors, might recover the goods from the creditors who had taken possession of them under a commission of bankruptcy. My Brother *Wilde* has said, that, in that case, the Court held that there never existed any contract at all between the vendor and vendee; but I do not find any such thing stated in the judgment, nor do the circumstances of the case admit of such a supposition. Next comes the case of *Smith v. Field*. There the Court expressly recognised and confirmed the cases of *Atkin v. Barwick*, and *Salte v. Field*; but in the case then before them, the vendors had refused to rescind the contract when the vendee was willing to have done so; and, on the contrary, had confirmed it by attaching the goods as the property of the vendee. Subsequently the rights of third persons intervened, and it was then too late. In *Barnes v. Freeland* the delivery was complete; the goods were in the warehouse of the vendee, and the attempt, therefore, by the vendee, on finding himself

insolvent, to rescind the sale, was considered a fraudulent interference with the rights of the other creditors. Lord Kenyon distinguished the case on that ground from those which have been already commented upon. The same remark applies to the case of *Harman v. Fisher*. (a) But here the goods never came into the hands of the vendee at all. It has been said, indeed, that by the delivery to the wharfinger the transaction was complete, and that the goods were constructively in the possession of the vendee. But the contrary was expressly decided in the case of *Mills v. Ball*. Upon principle, therefore, fortified by the authority of these cases, I am of opinion that the plaintiff is entitled to recover.

PARK J. also took a review of the cases, and shewed that the principle adopted by the Courts was, that of saving the vendor, whenever it could be done without interfering with the rights of the general creditors, or giving a sanction to a fraudulent preference. That in this case, the *transitus* was not at an end. The goods had never come, either actually or constructively, into the possession of the vendee. That the contract was therefore still open and executory; and that what had been done by the vendee on the one hand, in refusing to accept the goods, and the vendor on the other, in assenting to that refusal, amounted to a positive rescinding of the sale.

BURROUGH and GASELEE Js. concurred.

Postea to the plaintiff.

(a) Cowper, 123., and to the case of *Neate v. Ball*, 2 East, 371.

The case of *Richardson v. Goss* (b) in many respects resembles the present. That was an action of trover by

(b) 3 Bos. & Pul. 119.

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the vendor of goods against a wharfinger, who claimed a lien upon them for his general balance against the vendee. The vendee, finding himself insolvent, wrote to the vendor, before the arrival of the goods, that he would not apply for them. The latter returned an answer in which no express assent was given, but he immediately set off himself to take possession of the goods. The vendee had previously instructed the wharfinger that such goods would arrive by a particular ship, and that he must receive them as usual. He accordingly did so, and paid the freight and charges, the vendee having omitted subsequently to countermand the orders he had given. The vendor, on his arrival, demanded the goods, tendering the amount of freight and charges upon them; but the wharfinger refused to give them up, unless the general balance due from the vendee to himself were also paid. The Chief Justice there stated the question to be, "Whether the contract between the plaintiff (the vendor) and *Wilson* (the vendee) was not completely put an end to before the goods were received;" and gave it as his opinion that, "unless it could be shown that the goods did not come into the hands of the defendant (the wharfinger) *as the goods of the plaintiff*, that the latter was entitled to recover;" and the Court held, that the contract ceased to be in force from the time of the letter written by the vendee, that renunciation on his part having been subsequently adopted by the acts of the plaintiff. Upon the authority of that case the Court, it seems, would have been justified in considering the rescinding of the contract to have had reference to the notice given by *Vincent*; and the Chief Justice intimates an opinion of that kind, when he says it would have been enough if the contract had been merely *suspended* at the time of the seizure. This case, therefore, is stronger.

It appeared in *Richardson v. Goss* that the vendee was in the habit of using the wharf as a warehouse, and the Court inclined to think that, under such circumstances, the *transitus* would be at an end by the delivery to the wharfinger. (a) It was necessary, therefore, to put the case on

(a) This opinion was soon after confirmed by the case of *Scott and Others v. Pettit*, 3 Bos. & Pul. 469., and has lately been recognized by the Court of King's Bench in *Foster v. Frampton*, 6 B. & C. 107.

the ground of a rescinding of the contract. If the *transitus* had not been determined, the consignor would have had his right of stoppage, and the wharfinger could not, in that case, have set up a general lien as against him: he could only claim his charges on the particular goods. (a) The other being a question between him and the consignee, his remedy by way of lien could only attach on that which was then the property of the consignee. In the present case it does not appear that the wharf ever had been used by the vendee as his warehouse, and the delivery, therefore, was not complete when the notice was given. But, even had it been otherwise, still it is conceived, on the authority of *Richardson v. Goss*, the plaintiff would, at all events, have been entitled to a verdict for the thirteen hogsheads which arrived on the 4th, the repudiation of the sale on the part of the vendee having taken place on the 3d.

The equity of the case in this instance was clearly with the plaintiff; he acted as an honest man. If any risk or loss were to be sustained, it ought rather to fall on the person who enabled him to hold himself out to the world as a substantial trader, than on him who was induced thereby to supply him with goods on credit. But where a bankruptcy supervenes, very nice cases may, and frequently do, occur on this point. On the one hand, it is extremely hard that goods not received until the vendee is insolvent, should, nevertheless, be treated as his property, and thus be lost to the vendor. It is but honest under such circumstances to return them; and, therefore, the Courts have, whenever it has been possible, upheld such a transaction. But neither sound policy nor justice, if the matter be rightly considered, will allow that this should be done to the prejudice of the claims of the general creditors. They have a right to the

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(a) In a case of *Hawley and Others v. Day*, which came before the Court of King's Bench in Easter term last, and which was trover by consignors against wharfinger, who claimed a lien for his general balance due from the consignee; after verdict for plaintiff, the court refused a rule *nisi* for a new trial, considering the law on that point perfectly clear; but it appearing subsequently that the *transitus* was at an end, the wharf being used as the defendant's warehouse, a rule was granted on the ground that the right of stoppage was gone.

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equal distribution of all which at the time of the bankruptcy *belongs to* the bankrupt. Wherever, therefore, the property has been by any act reduced *into the possession* of the insolvent, that right immediately attaches, and cannot thenceforth be defeated; any return of the goods, or any agreement with the creditor for that purpose, becomes immediately a fraud, and a voluntary preference. It was to obviate the injury to which vendors were liable in consequence of this necessary rigour of the law that stoppage *in transitu* was originally instituted. This is their peculiar remedy in such cases, and if this be omitted, they must in general abide by the consequences. Whether, therefore, the renunciation of a sale by the act of an insolvent vendee, assented to by the vendor, is a *bona fide* transaction, or whether it is a fraudulent preference, is a question which will, for the most part, depend on this: first, Whether any act was done by the vendee before that revocation which amounted to an acceptance of the goods, and a closing and completion of the contract thereby: and, secondly, Whether, at the time of the revocation, the rights of third persons had intervened. In either of these cases it is inoperative, and the property of the vendor is absolutely gone. (a)

(a) As to the determination of the *transitus*, and vesting of the absolute property in the vendee, see further *Dixon v. Baldwin*, 5 East, 175. *Rowe v. Pickford*, 8 Taunt. 83. *Buck v. Hatfield*, 5 B. & A. 632. *Crawshay v. Eades*, 1 B. & C. 181.; and *Coates and Another v. Railton and Another*, 6 B. & C. 422.

STATUTE OF LIMITATIONS.—EVIDENCE 1828.
OF NEW PROMISE.

In the KING'S BENCH.—*Easter Term.*

RICHARD B. BURLEIGH, Executor of ROBERT BURLEIGH, v. ELIZABETH PLATT, Administratrix of THOMAS STOTT.

ASSUMPSIT on a joint and several promissory note, made 4th *March* 1818, by *Thomas Burleigh* and *Thomas Stott*, for 600*l.*, payable to *Robert Burleigh*, on demand. Pleas, the general issue, and the statute of limitations.

This case was tried at *Guildhall*, before Lord *Tenterden*, at the sittings before *Michaelmas* term 1827, when a verdict was taken for the plaintiff, subject to the opinion of the Court, on a case which stated that the note had been given by *Thomas Burleigh* to *Robert Burleigh* for money lent, and that *Thomas Stott* was a surety; that on the 10th *October* 1818 *Thomas Burleigh* paid the interest then due, and *Robert Burleigh* indorsed on the note, “Received the interest on this note to the 10th *October* 1818; — *Robert Burleigh*.” That on the 10th *October* 1820 *Thomas Burleigh* paid the further interest then due, and 100*l.* on account, and that *Robert Burleigh* indorsed on the note, “Received the interest on this note to the 10th *October* 1820, and 100*l.* on account of the principal, leaving due 500*l.*” From his signing the note till his death *Thomas Stott* had no communication with *Thomas Burleigh* about the note. *Robert Burleigh* always applied to *Thomas Burleigh* for money. The two payments made by *Thomas Burleigh* were made without any communication with *Thomas Stott*.

In an action upon a joint and several promissory note against the representative of the surety, payment of interest by the principal within six years, and during the life-time of the surety, is evidence of a joint and several promise to pay on the part of the surety, so as to take the case out of the statute of limitations, although in such action the note is necessarily treated as a separate note.

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Thomas Stott died 3d March 1821. *Thomas Burleigh* died 8th July 1821.

The question was, Whether the plaintiff's claim was barred by the statute of limitations?

Chitty for the plaintiff. The case states, that *Stott* had no communication with *Burleigh* for a long time before his death, and knew nothing about the note. There is consequently no presumption of payment on his part. It is expressly negatived by the fact. Then the indorsement of the payment of interest and part of the principal by the other, equally repels the presumption with respect to him; and this admission on his part is binding upon the joint maker. The case may be likened to a partnership. Now an admission by one partner as to a partnership matter, even after dissolution, will bind the other; *Wood v. Braddick.* (a) Although, therefore, the note was made several by the death of *Stott*, yet the acknowledgment by *Thomas Burleigh*, during the life of *Stott*, and while they were jointly liable upon the note, was binding upon the latter, and is still binding on his representatives, though the joint liability has been now severed; *Perham v. Raynall.* (b) This case is different from that of *Atkins v. Tredgold.* (c) There the acknowledgment was made after the death of the joint contractor, and consequently could not raise a promise on the part of his representatives. *Whitcomb v. Whiting* (d) is expressly in point; for there, also, the note was joint and several; and in this case, as in that, all the parties were alive when the payment was made.

Alderson for the defendant. The principle on which the cases upon the statute of limitations proceed is not

(a) 1 Taunt. 104.
(c) 2 B. & C. 23.

(b) 2 Bingh. 506.
(d) Doug. 652.

a presumption of payment, otherwise a promise after the death of one of the parties would be as binding on his representatives as it would be on him during his life; the contrary of which was decided in *Atkins v. Tredgold*. It is true, that an admission of the debt by one of the joint makers of a promissory note is binding on the other. But this is no longer a *joint* note; from that time it became *separate*. Besides, the plaintiff himself has brought his action upon it as a several note, treating it as if each of the parties had made a separate instrument. The payment of interest, therefore, by *Thomas Burleigh* in his lifetime was upon a distinct note, and cannot be brought forward as evidence of an acknowledgment, from whence the law will infer a promise on the part of *Stott* to pay this, which must, under the circumstances, be regarded as another note.

Chitty in reply. The acknowledgment by *T. Burleigh* was binding upon *Stott*, though the relation of the parties has since been changed. It is exactly analogous to the case of a partnership. *Stott* left the affair of the note and its payment to his *quasi* managing partner, and the payment of the interest by such acting partner is binding upon the other, and is sufficient to take the case out of the statute, and revive the promise against him.

Lord TENTERDEN. The late constructions of the act have put these cases on a better footing than they were before. (a) It is now settled, that the statute does not proceed upon the presumption of payment, and that, in order to revive the debt, there must be such an acknowledgment as will be sufficient to raise a fresh

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(a) See the judgment of the Court in *Tanner v. Smart*, 6 B. & C. 604., where the cases are all reviewed.

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promise. Now, in this case, I think there is sufficient evidence of a promise to pay jointly and severally. The payment of interest would take the case out of the statute as against him who paid, and would keep the note alive. It would still be a joint and several note, and would consequently continue in force against the other. *Stott* died before *Burleigh*, and it is therefore necessarily now treated as a several note.

BAYLEY J. The payment follows the nature of the note. If the note were joint and several, the payment raises a joint and several promise. Although a note be joint and several, the debt for which it is given is one, and payments made by either of the parties go in discharge or diminution of that debt. The intestate of the plaintiff received the benefit of the payment, and he must take it, therefore, with its other consequences.

HOLROYD and LITTLEDALE Js. concurred.

Postea to the plaintiff.

1 B. & A. 466.
 et seq.
 2 B. & C. 27.
 et seq.

The effect of this decision is to set up again the case of *Whitcomb v. Whiting*, the authority of which, from the successive attacks made upon it from the Bench, had been much shaken. It seems, therefore, now settled that, not only an acknowledgment, or payment of interest which operates as an acknowledgment, by one of the makers of a *joint* note will take a case out of the statute as against the other parties, but also where the note is *joint and several*, and may, therefore, be treated as either the one or the other, at the election of the holder, still, even though he chooses to proceed upon it as a several note, payment of interest by one party is in legal effect an acknowledgment of all. The decision of course proceeds upon the principle that, by the acknowledgment, the right of action upon the note is preserved, which right is a right to proceed against all the

parties jointly, or either of them separately, as may be found expedient.

Now with respect to the makers of a joint note, although the hardship is perhaps as strong in their case as in that of parties to a joint and several note, still it must be admitted that the rules of law require that an acknowledgment, which has the effect of preventing the operation of the statute as to one, must have the same effect with respect to all. Else this inconvenience would follow : if the party who had made the acknowledgment were sued alone, he might plead the non-joinder of the co-makers in abatement; it would be necessary, therefore, to amend the writ, and sue all jointly. Suppose, then, that the rest of the parties having made no such acknowledgment might plead the statute, it would not only be a bar to the action as against themselves, but would also defeat it with respect to all, because the judgment in a joint contract cannot be severed. But how does this apply to the case where the party, either necessarily, as in the case in the text, or voluntarily, treats the instrument as several ? The same consequences cannot follow in that case, because the same reason does not exist. One party may be released from his obligation in law, without at all affecting the liability of the rest. There is, therefore, no necessary legal reason in such a case for holding that the right of action being revived or kept alive as against one, the operation of it shall extend to the others. The Court then must have considered themselves bound by the decision in *Whitcomb v. Whiting*. If, therefore, it can be shewn that that case was determined upon a principle which does not warrant the determination, it might become doubtful whether it was right to uphold it.

Now the judgment of Lord *Mansfield*, which seems to have been given, if it may be allowed us to say so, rather off-hand, is this: " Payment by one is payment for all, the one acting virtually as agent for the rest; and in the same manner an admission by one is an admission by all; and the law raises the promise to pay, when the debt is admitted to be due." And *Willes J.* adds, " The defendant has had the advantage of the partial payment, and must, therefore, be bound by it." Now this last argument, which is also the first of Lord *Mansfield's* reasons, proceeds upon what seems to be a fallacy; it is this,—that be-

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cause the act of another, so far as it is beneficial, enures to my benefit, therefore, so far as it is prejudicial also, it shall enure to my prejudice; a reasoning not very conclusive. The advantage extends to all; and why? because there is but one debt, and payment therefore by any one *pro tanto* diminishes that debt. But why should the disadvantage extend to all? The liability is not one, though the debt is: the liability of each is several and personal to himself; and why should the act of one, affecting his separate liability, affect also the distinct liability of another?

Then as to the second branch of Lord *Mansfield's* argument, viz. that the debt is admitted to be due, and that a promise attaches thereupon as a consequence of law, it must proceed upon this notion, that the *debt was suspended* by the statute, and revived by the acknowledgment; but, with submission, this is not so: the statute does not affect the debt, it merely suspends the remedy; it is the *right of action* which is taken away, not the *foundation* of it. It has, indeed, been for a long time supposed that the effect of the statute was to raise a presumption of payment, and that any thing, therefore, which repelled that presumption, at once set up the debt again, and if this view were the right one, Lord *Mansfield's* principle would, perhaps, be correct. But the Courts are now unanimous that this is not the proper construction or effect of the statute, and they hold that to defeat its operation it is necessary to give such evidence as will be sufficient to raise the inference of a *new promise*. The consideration for the promise, in other words, the debt remained; it was the legal obligation which was or would have been put in abeyance by the statute, and is renewed or kept alive by the subsequent promise.

The new liability is not, therefore, under these circumstances, as Lord *Mansfield* supposed, a consequence of the revival of the debt, for that never slept; it is a consequence solely of a new promise, or an acknowledgment which is evidence of a promise. The reasons, therefore, of Lord *Mansfield* do not seem to warrant his conclusion, and we have endeavoured before to prove that there is no rule of law inconsistent with a contrary determination.

It remains, therefore, only to shew that this is not a case which the Courts ought to be anxious to press; that it is in fact necessarily attended with great hardship, possibly with

some cruelty; and here we may content ourselves with observing, that the hardship has been admitted, and that a bill has just passed (a) rendering the written acknowledgment of one not binding on the others, and obviating the legal inconveniences which would have resulted in the case of a joint contract from such a determination. We may refer also to the opinion of Lord *Ellenborough* expressed in *Bramtram v. Wharton*, and to that of the learned Judges of the Court of King's Bench in *Atkins v. Tredgold*; and though the consequences might, without unfairness, be pressed much farther, this will be sufficient for our purpose. It may, therefore, though it is with the most unfeigned deference that such a remark is hazarded, be perhaps regretted that the Courts, having "put the construction of the statute on a better footing than formerly," should have hesitated in this case to follow out their more correct principle to its legitimate consequences; and it is the more to be regretted, because the recent enactment has expressly provided that payment of interest shall have the effect of an acknowledgment as before.

The clauses of that act which relate to the present subject are the following. In the first section, after enacting, "That in an action of debt or upon the case grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments, or either of them, or to deprive any party of the benefits thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the parties chargeable thereby;" it adds, "that where there shall be two or more joint contractors or executors, or administrators of any contractor, no such joint contractor, executor, or administrator shall lose the benefit of the said enactments, or any of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them: provided always, that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever: provided also, that in actions to be

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commenced against two or more such joint contractors, or executors, or administrators, if it shall appear at the trial or otherwise that the plaintiff, though barred by either of the said recited acts, or this act, as to one or more of such joint contractors, or executors, or administrators, shall nevertheless be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment or promise, or otherwise, judgment may be given and costs allowed for the plaintiff as to such defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff."

In the second section it is enacted, " That if any defendant or defendants in any action on any simple contract shall plead any matter in abatement, to the effect that any person or persons ought to be jointly sued, and issue be joined on such plea, and it shall appear at the trial that the action could not, by reason of the said recited acts or this act, or either of them, be maintained against the other person or persons named in such plea, or any of them, the issue joined on such plea shall be found against the party pleading the same."

And in the third section it is enacted, " That no indorsement or memorandum of any payment written or made after the time appointed for this act to take effect, upon any promissory note, bill of exchange, or other writing, by or on the behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of either of the said statutes."

It is true that this last section makes the proof of payment, whether of principal or interest, more difficult, and places it out of the power of the holder to forge evidence for himself.

This wise and salutary statute comes into operation on the 1st day of January 1829.

LIABILITY OF SHIP-OWNERS TO
FREIGHTER.—CHARTER-PARTY.

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In the KING'S BENCH.—*Easter Term.*

COLVIN and Others, surviving Partners, &c. v. NEWBERRY and Another, surviving Owners of the Ship BENSON.

ACTION on the case for negligence in not safely carrying the plaintiff's goods. There were four special counts varying the complaint, and a count for trover: but as nothing ultimately turned upon the form of declaring, it is unnecessary to set them out. The defendants pleaded the general issue, and the cause came on for trial at *Guildhall* in the sittings after *Michaelmas* term in 1826, when the jury found a special verdict, which set forth in substance as follows: That on the 11th *March* 1817, the plaintiffs and *Alexander Colvin*, the elder, since deceased, shipped on board the *Benson*, then riding at anchor in the *Hooghly*, 2171 bags of sugar and 191 chests of indigo, at that time in good order and well conditioned, consigned to *Bazett, Farquhar, Crawford, and Co.*, for which a bill of lading was signed by *George Betham* as master; that the defendants and one *James Capper*, since deceased, were the owners of the ship; and that before she sailed to the *East Indies* a charter-party was entered into, dated the 7th of *June* 1816, between one of the defendants *Benson*, as managing owner, of the one part, and *Betham* of the other, whereby the owner "did promise and agree to and with the said *G. B.*, his executors, &c., that the said *G. B.* should be, and he was thereby ac-

Construction put by the Court upon a very special appointment of a master and commander, by an instrument in the nature of a charter-party.

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cordingly appointed to the command of the said ship, but with such restrictions as thereinafter mentioned," &c.; and the said *G. B.* was thereby allowed and permitted to receive, take, and load on board the said ship in the port of *London* all such lawful goods as he should think fit, reserving sufficient stowage for 100 tons to be laden on account of the said owner; and the said ship being so laden, it was agreed that he the said *G. B.* should and would set sail therewith, and proceed to *Calcutta*, with liberty to touch at *Madeira* and *Madras*; and being arrived at *Calcutta*, should and would unload the said outward cargo, and reload the said ship with a cargo of *East India* produce, and return with the same to the port of *London*; and upon her arrival there, and being discharged and cleared, the said intended voyage and service was to end and be completed (the act of God, &c.) And the said *G. B.* agreed that if any of the complement of thirty-five should happen to die, he would, at the expence of the owner, keep up the number, if practicable, to thirty-two, and would provide, at the owner's expence, all necessary stores, &c.; and further, that the ship should, if required, be kept and continued in the service aforesaid for the term of twelve calendar months, and for such longer time as might be necessary to complete the voyage. And the owner agreed to provide water casks, and also coals and wood for cooking the passengers' provisions, "for which the said *freighter* was to pay and allow unto the said owner at and after the rate of 14*d.* for every passenger per lunar month." In consideration whereof "the said *George Betham* did thereby promise and agree to and with the said owner that he the said *G. B.* should and would take upon himself the command of the said ship for and during her said intended voyage, and until her return to the port of *London*, and should and would navigate her to the utmost of his skill and ability;" and also that he would

accept and take the ship into *his service* for the term of twelve calendar months certain, and for such longer time, &c. And further, that “ he the said G. B. should and would well and truly pay or cause to be paid unto the said owner, his executors, &c., *freight for the use or hire of the said ship*, at and after the rate of 25s. per ton register measurement,” per calendar month for the twelve months certain, and for such longer period, &c. in manner following, viz. the sum of 1000*l.* at or before the execution of the charter-party, 2000*l.* by bill or bills on *Calcutta* in favour of the owner, payable one half at one calendar month, and the other half at two calendar months after the arrival of the ship at *Calcutta*, and the remainder of *such freight* to be paid upon the arrival of the ship in *London*, &c. After a provision for payment by another bill at *Calcutta*, in case of demurrage, “ the said G. B. did further agree that all the bills of exchange which might be taken in payment of the freight of the said ship’s homeward cargo, should be made payable to Messrs. *Buckles, Bagster, and Buchanan*, in *London*, or indorsed over to them, and delivered to the said owner’s agent, to be by him remitted to that firm in *London*, who it was especially agreed between the parties were to receive the amount thereof as joint trustees for the said owner and the said G. B., he the said G. B. thereby authorizing and empowering them to appropriate the proceeds of such bills in or towards payment to the said owner of the balance of freight which might become due to him under the charter-party, and the residue, if any, to the said G. B.” And the said G. B. agreed to furnish water and provisions for the passengers, and to pay for all provisions belonging to the owner which should be consumed on the voyage, and to provide accommodations for the passengers, &c. Then, after stipulating that the owner should be permitted to ship an outward cargo not ex-

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ceeding 100 tons, "it was expressly agreed and understood by and between the parties, and particularly by the said G. B., that an agent should be put on board the said ship by the said owner for and during the whole of her aforesaid voyage and service," &c., which agent was to have the *sole management, direction, and superintendence* of the said ship's stores and provisions, and the issuing and delivering out of the same for and during the said intended voyage; and such agent was likewise to have the *sole ordering and purchasing of any supplies, stores, provisions, and other articles which might be required for the use of the said ship during her said voyage.* And it was further agreed that *all bills* which might be required to be drawn upon the owners of the said ship for any such supplies, or otherwise on account of the said ship, should be drawn by *such agent* only. And the said G. B. agreed not to interfere with the duties so assigned to the agent. And it was further agreed between the parties, "and especially by the owner, that the said freighter should have the liberty and privilege of employing the said ship in the *East Indies* for any intermediate voyage or voyages he might think fit, without prejudice to the charter-party," but not exceeding in the whole the period of twelve months, reckoned from thirty days after the arrival of the ship at *Calcutta*, paying the same rate of freight as before. And "it was expressly provided and declared, that in case the said G. B. should proceed with the said ship to any port or place other than *Madeira, Madras, and Calcutta* aforesaid, without the special leave in writing of the agent of the said owner for the time being, or if the said G. B. should be guilty of a breach of any of the promises and agreements therein contained on his part, then the said G. B. should become divested of any further command of and in the said ship, and it should thereupon be lawful for the said owner's agent for the

time being to appoint another commander for the said ship in lieu and stead of the said *G. B.*” And it was further agreed that in case of demurrage at *Calcutta*, and default on the part of the said *G. B.* to pay the sums stipulated in that event, then the agent of the owner might load a home cargo on the owner’s account. And, lastly, the said *G. B.* agreed not to carry too great a press of sail; not to put into any port unless compelled by stress of weather, &c.; and in case it should be necessary to refit, to use no unnecessary delay, &c. And to the true performance of all these promises and agreements the parties respectively bound themselves each to the other, especially the said owner the said ship or vessel, her freight and appurtenances, and the said freighter the goods to be laden in her, in the sum of 1500*l.* And the jurors found that this charter-party was executed *bond fide*. That on the 25th of July 1826, the following memorandum was signed by the parties: “Conditions agreed between *Thomas S. Benson*, Esq., owner, and *George Betham*, Esq., commander of the ship *Benson*, on a voyage to *India*. Wages, 10*l.* per month; no primage or privilege of tonnage whatever; cabin-allowance for voyage (it being understood that the agent, chief and second mates, and surgeon, if any, mess in cabin), 150*l.*; owner providing nothing; allowance while in *India* three sicca rupees per day.” That one *Samuel Oviatt* went as agent under the charter-party on the voyage, and carried out letters from Messrs. *Buckles, Bagster, and Buchanan*, merchants in *London*, on behalf of the defendants, introducing him to the plaintiffs, by which he was directed to apply to them in case of necessity; that he did apply to them, and they acted as agents at *Calcutta* both for the defendants and *Betham*; that the said *Samuel Oviatt* under a power of attorney, which was particularly set forth, and by which after reciting the charter-party, he was con-

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stituted sole agent of *Benson*, the managing owner, with powers to perform all that was stipulated by the charter-party to be performed by him; that the said S. O. carried out with him the charter-party, and communicated it to the plaintiffs as soon as he arrived at *Calcutta*, and before the shipping of the goods, and that the plaintiffs read and had a copy of it; that for the freight of the goods shipped by them the plaintiffs drew bills payable sixty days after the ship's arrival in *London* to the order of *Buckles, Bagster, and Buchanan*, which bills they delivered to *Oviatt*, to be remitted to that firm, pursuant to the stipulations in the charty-party, and that they were so remitted; that the plaintiffs acted as the agents of *Betham*, collecting and paying over to him the freight of the goods carried in the ship in the voyage from *London* to *Calcutta*, and procuring freight for the homeward voyage, and that they had a commission from him for that purpose; that the ship sailed from the *Hooghly* for *London* with the said quantity of sugar and indigo on board, but that they were never delivered to the plaintiffs or their assigns pursuant to the bill of lading, although no act of God, &c.; but, on the contrary, 1651 bags of the sugar and twelve chests of the indigo were wholly lost to the plaintiffs, and the residue greatly lessened in value. But whether the defendants were guilty of the premises, &c.; but if it should seem to the Court that the defendants were guilty, then they assessed the damages at 10,000*l.*

Parke for the plaintiffs. The question is, whether the owners of this ship are liable to the plaintiffs for the negligence or misconduct of *Betham* the commander? If by true construction this instrument was not a demise of the ship to *Betham*, but merely a special appointment of a master, with certain stipulations as to his remuneration, then the owners (the defendants) are liable.

Now, there are in this instrument no words of demise. There is nothing which makes *Betham* owner *pro hac vice*. It merely constitutes him master and commander on special terms, "with such restrictions as thereafter named." This first part is a key to the whole. He is throughout termed "master and commander;" and in case of disobedience he is to be removed from the command by the agent on board. The instrument is called a charter-party; but there are in it none of the usual words of a charter-party. The whole effect of it is this: *Betham* is appointed commander for the voyage. He guarantees to the owner that the profits shall be so much, and he is to take the surplus. This, however, is an arrangement merely with the owners. As to others, who know nothing of such an arrangement, and cannot therefore be affected by it, the defendants are liable for his acts. If it were otherwise, it would amount to a contrivance whereby the defendants should have all the benefit of freight, and yet not be liable for any loss. *Boucher v. Lawson* (a) was an action by the freighter against the owners, and Lord *Hardwicke* was of opinion that the circumstance of the master receiving a part of the ship's earnings as remuneration, being an agreement between him and the owners, made no difference as to their liability. This is also an action against the owner, and in like manner he is not exempt from liability on account of any private agreement between him and his master and commander whereby the latter has a benefit from the freight. That case is therefore an authority for this point; though the terms of the charter-party are certainly more special here, and there is a guarantee

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(a) Cu. temp. Hardw. 84. 195. Ab. on Sh. 94. It is interesting and amusing to observe how little was at that time understood of mercantile law. That case was considered one of great difficulty, and was argued no less than three several times.

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on the part of *Betham* that the profits shall amount to a particular sum. In the case of *Parish v. Crawford* (*a*) the captain had the freight of the goods, the owner the freight of the passengers; and yet Chief Justice *Lee* held the owner liable for a loss. His words are, "Though *Crawford* (the owner) has not that freight which the merchants pay for their goods, yet as he has the benefit of the freight in general, he has that equitable motive which makes him liable." The authority of that case has been questioned; but that which makes it questionable is precisely what distinguishes it from the present case. Here, although it is true freight for goods is certainly to go into the hands of *Betham*, yet the owners stipulate that all the bills of exchange drawn on account of freight shall be paid into the hands of a common trustee for themselves and *Betham*. Therefore not only have they the benefit of freight, but it is even secured to them by the stipulations of the charter-party; and yet they turn round and say, "we are not liable; your arrangement was made with the master,"—a man whom they themselves consider so unsafe, that they require the bills to be paid into the hands of a trustee. The present case is distinguishable also from *James v. Jones* and *M'Kenzie v. Roe*. (*b*) In neither of those cases does it appear that the goods were received on board by an agent appointed by the owner, whereas here there is no question on that point. In general the owner is liable; and the question therefore is, whether the stipulations in this instrument have introduced any exception. It is clearly the policy of the legislature that the owner should be responsible.

Campbell for the defendants. A verdict for the plaintiffs cannot be sustained on this declaration. This is

(*a*) Strange, 91. Ab. on Sh. 19. (*b*) Ab. on Sh. 20, 21.

called an action on the case; but it is in substance an action of contract. It does not arise on the breach of any common law obligation, but of a duty created by the contract. It is alleged, indeed, in the declaration to be the duty of the defendants to carry goods safely from *Calcutta* to *London*. So it was if there was sufficient consideration; but in order to lay the foundation of that duty a contract must be proved. Now, here, in the first place, there was no undertaking on the part of the defendants to take care of the goods. The transaction was between the plaintiffs and a third person. And, in the second place, there was no consideration, or none such as is alleged. The declaration states that the goods were to be shipped on board, and taken care of for freight payable in that behalf: that means payable to *the defendants*, and would so be held on demurrer. Freight payable to the defendants, therefore, is the specific consideration for the engagement and the foundation of the contract; but the proof here is of freight payable not to the defendants but to a third person, with the knowledge of the plaintiffs. Is there any thing in this charter-party which could lead the plaintiffs to consider the defendants as owners of freight? The real transaction was known to them. If there had been a secret agreement, as was urged on the other side, between the captain and owner, the shippers, not knowing of this, would have had their remedy against the owner; but here the plaintiffs had full notice of the agreement entered into between *Betham* and the defendants, and the verdict finds that it was done in good faith. Then as to the effect of the agreement, is there any thing to prevent the chartering of a ship to the captain? In practice it is done, and in law there is no objection to it; either the captain or the charterer may be owner *pro hac vice*. In what respect does this instrument differ from a common charter-party between owner and

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shipper? If *Betham* had not had power given him to repair, supply stores, &c., at *Calcutta*, then, certainly, this would not be a charter-party. The words "des-
mise or let to hire" are not, it is true, in the instrument; but the whole scope of it must be considered. *Betham* is to take the vessel *into his service*; he has the whole loading of her, not abroad only, but even in the port of *London*. Nothing has been said to distinguish this from a common charter-party, unless the same person cannot be captain and freighter; but he can be, as the same person may be captain and owner. But then there is an *agent* on board; and what is his duty? To take *care of the stores* for the owner, &c. It is like the case of a mining lease; the owner lets the mine, and appoints some person on his behalf to superintend the working of it, and take care of his reversionary interest. But *Betham* may be removed; and what is this, but the analogous power of re-entry in a lease; it is merely a condition, which, if not acted upon, amounts to nothing. The case may be tried in this way: Could the defendants have maintained an action against the shippers for freight? No; for there was no privity of contract. Now there must be a reciprocity in every contract, and, therefore, conversely the shipper here cannot bring an action against the owner. The general question then arises, whether, under such circumstances, the owners are liable in an action of contract? In *Boucher v. Lawson* the shippers considered the person who received the goods on board as *master* only, and did not know that the freight of the goods was to be his; but here, what *Betham* received from the plaintiffs, he received with their knowledge as *owner*, and for *freight*. In *Parish v. Crawford* it does not appear that the shipper had notice of the charter-party; but if he had, then that case cannot be maintained. [Bayley J. In *Parish v. Crawford* the owner had covenanted for the good conduct of

the captain.] Here there is no such covenant. *James v. Jones* and *Mackenzie v. Roe* are expressly in point. It is said that in those cases there was no person on board on behalf of the owners of the ship who received the goods; but the difference is immaterial; for here the shipper *has notice* that the captain is the owner. The ground taken by Lord *Mansfield* for the decision of the Court in *Rich v. Coe* (*a*) is, that the contractors had no notice of the private agreement between the owners and captain. Public policy is a dangerous topic; but even on this ground there seems to be no reason why the master should be prevented from being owner. The shipper will, in general, take effectual care for himself.

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Parke in reply. It may be conceded that this is an action on the case *ex contractu*. But, have not the defendants, through their master, contracted, in point of law, to carry these goods safely? Was he not, as to third persons, master only? Notice, or want of notice, can make no difference. The question is, What is the relation between the parties? It is said that the defendants are not liable unless they receive the benefit of freight.

(*a*) Cowper, 636. That was an action brought against the owners of a vessel, for necessaries supplied to the master, to whom the vessel had been regularly demised for a term. Lord Mansfield's words are, "In this case the defendants are the owners, and there happens to be a *private agreement* between them and the master, by which he is to have the sole conduct and management of the ship, and to keep her in repair, &c. But how does that affect the creditors, who, it is expressly stated, were total strangers to the transaction? To be sure, if it appeared that a tradesman had notice of such a contract, and in consequence of it gave credit to the captain individually, as the responsible person; particular circumstances of that sort might afford a ground to say he meant to absolve the owners, and to look singly to the personal security of the master. But here it is stated, that the plaintiff *had no notice whatever of the contract.*"

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True; but here they do receive that benefit, although, by a bye arrangement, the master is to receive the surplus. The freight is actually paid to the defendants. It is asked, Would the defendants be able to sue for freight? and it may be answered, that unquestionably they would. What does an instrument called a charter-party of demise mean? Does it not give the temporary possession of the vessel to the hirer? Here, the owners never part with the legal possession of the ship from the beginning to the end of the voyage. There is nothing like a demise. It is merely an appointment of a master, removable in case of disobedience; and, by way of countervailing privilege, he is to receive goods on board for freight, from which he is to derive a benefit. The owner appoints the crew, provides the stores, undertakes the repairs, &c.; and *Betham* undertakes the command and navigating of the ship. He is, therefore, merely the master; the defendants are still the owners.

Cur. adv. vult.

On a subsequent day in this same term the judgment of the Court was delivered by

LORD TENTERDEN. We are of opinion that the owners are not discharged from their liability by the stipulations of this instrument. It is in effect an appointment (though a very special one) of a master, with an undertaking by him that the ship shall earn a certain sum for freight. It would give rise to great confusion and mistake if owners of ships were to be exempted from their liability, by contracts made between themselves and third persons. In this case, it is true, the plaintiffs were acquainted with the existence of this charter-party; but, notwithstanding this, the question still is, are the defendants by that instrument released from the liability which the law casts upon them as

owners? And we are clearly of opinion that they are not.

Postea to the plaintiffs.

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The instrument upon which this question arose was certainly a very singular one. No general rule can be obtained from it, because the conclusion is rather a combined result of the peculiar circumstances of the case, than an application of any legal principle. It may, however, serve as a guide for interpretation, in case circumstances in any way resembling it should again occur.

The fact seems to have been, that the owner, whatever opinion he might have had of the ability of the captain, scarcely considered him trustworthy. He wished, therefore, to limit and control the exercise of his powers of commander, and partly by way of equivalent, and partly, perhaps, to stimulate exertion, by giving him an interest in the profits of the voyage, granted him the surplus freight, with leave to make an intermediate experimental voyage. It is not probable that at the time of making the agreement there was any idea of releasing the owners from liability, else it would have been more carefully expressed; that seems to have been altogether an after-thought. If the master had really been the *charterer* of the vessel, then there is little doubt that he would have been the person liable to the plaintiffs; and that, upon the ground taken in argument, there would have been in that case no privity of contract between the shippers and owner. It seems, indeed, to have been admitted on both sides, and there is little doubt upon the matter as a general principle, that if the charterer loads the ship with the goods of other persons, he is, as to them, considered as the owner.(a) Whether the shippers have, or have not, notice of the relation in which he stands, is, it should seem, altogether immaterial.

(a) See Ab. on Sh. 19.

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CHARTER-PARTY.— FOREIGN JUDGMENT. — FREIGHT.

In the COMMON PLEAS.— *Trinity* Term.

KYMER and Others, Assignees of JOHN O'BRIEN, a Bankrupt, v. LARKIN and Another.

Action for money had and received by the assignees of a bankrupt charterer against the owners, as the proceeds of a cargo shipped outward, and attached by the master in a foreign state: Held, not maintainable, the bankrupt having previously assigned the goods to others, as a security for advances.

Freight earned by a chartered vessel put up as a general ship on the homeward voyage, cannot be recovered by the charterer from the owner, in an action for money had and received.

ASSUMPSIT for money had and received to the use of the bankrupt before his bankruptcy, or of the assignees after the bankruptcy. The action was tried some years ago before Mr. Justice Park, in *London*, upon admissions, and the plaintiffs recovered a verdict for 812*l.*, subject to the opinion of the Court on a case which, in substance, stated, that the defendants were owners of the ship *Lord Cawdor*, of which *John Brooks* was master; that *Brooks*, as agent for the defendants, entered into a charter-party with *O'Brien*, dated 15th *June* 1818, whereby he let the vessel for freight to *O'Brien* for six months certain, and for such longer period as the affreighter might think proper to employ it. The vessel was to take in cargo in *London*, and proceed to such port in the *West Indies* as the affreighter should appoint; there deliver the cargo, and take in another, with which she was to return. The master was not to take on board any goods during the voyage except from the affreighter or his agents. The affreighter covenanted to pay for freight at the rate of 21*s.* per month per ton of register tonnage, for six months certain, and so on in proportion for any longer time she might be employed in the voyage, until her final discharge in *London*, or such port on the Continent as should be agreed upon, with 10 per cent. primage, and twenty-five guineas hat money; the payments to be made as follows: two months' pay,

with 10 per cent. thereon, on the ship clearing at the custom-house in *London*, by bill at two months, and after the expiration of six calendar months from the date of the charter-party, a similar bill at two months; and the remainder of the freight, &c. on the final discharge of the ship, in cash. He also covenanted to provide by himself or his agents a home cargo; and both parties for the due performance of their respective covenants bound, the master the ship, and the affreighter the goods, in the penal sum of 1000*l.* *O'Brien* accordingly loaded the ship with a full cargo, consigned to his agent Mr. *Robert Sutherland*, at *Port-au-Prince*, for sale; and the vessel arriving there in *August 1818*, the goods were delivered accordingly. On the 20th *February 1819*, *O'Brien*, in consideration of advances made and to be made by Messrs. *Campbell* and *Bowden*, assigned to them by deed the goods in question, together with the cargo of another vessel also consigned to Mr. *Sutherland*, and both parties by the same instrument appointed Mr. *Henry Wylie*, then about to proceed to *Port-au-Prince*, and Messrs. *Sureau* and Co. of that place their attorneys, to receive from *Sutherland* "the said cargoes and the proceeds thereof, and to act for them generally in their affairs relating to the said charter-party." *Sutherland* died; but before his death, *Sureau* and Co. caused the goods to be transferred from his warehouse to their own by virtue of the power in the deed of assignment. The master (*Brooks*) having waited some time for a return cargo, when neither *Sutherland*, nor *Wylie*, nor *Sureau* and Co. would procure him one according to the stipulations of the charter-party, on the 21st *May 1819*, instituted proceedings in one of the inferior courts of *Hayti*, by which he attached the goods in the hands of *Sureau* and Co. on a claim for eleven months' freight (amounting, after giving credit for their bills and a sum received, to 1109*l. 19s. 6d.*)

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and for the penalty of 1000*l.* for the non-performance of the covenant to provide a home cargo. In this suit the court gave judgment against *O'Brien*, “a foreigner, absent in default.” Messrs. *Campbell* and *Bowden*, and Mr. *Wylie*, then came in to protect the goods, and carried an appeal from this inferior tribunal to the Supreme Court, in which the judgment was confirmed, and the sum of 2182*l.* for the debt, penalty, and costs, recovered from *Sureau* and Co., by sale of the goods. Of this sum 336*l.* 19*s.* 3*d.* was retained by the defendants’ agents for law charges and commission, and the remainder remitted to them. On the day after instituting proceedings, the master, *Brooks*, wrote a letter to *O'Brien*, in which, after stating the refusal of his agents to supply a cargo, &c., he says, “I shall put the vessel up as a general ship for *London* on your account.” In the following *July* he loaded the ship with goods at *Port-au-Prince* on freight for *London*, where she arrived on the 17th *October* following. For the freight of these goods the defendants received the sum of 779*l.* 0*s.* 9*d.*, after taking from which the deductions which they were entitled to make, a balance remained of 671*l.* 11*s.* 3*d.* The whole freight of the vessel under the charter-party, from the 17th *June* 1818 to the 17th *October* 1819, amounted, together with primeage, to 2933*l.* 11*s.*; and up to the time of the attachment, with primeage and gratuity, to 2044*l.* 2*s.* 10*d.* The commission of bankruptcy was dated 18th *October* 1819. The question for the Court was, first, whether the plaintiffs could recover the proceeds of the outward cargo; and, secondly, whether they were entitled to the sum earned for freight on the homeward voyage, giving credit for the whole amount of freight due as above stated under the charter-party; or whether, at all events, they were not entitled to so much of what had actually come into the hands of the defendants as remained after setting off as before.

• *Taddy* Serjt. for the plaintiffs. The case resolves itself into two questions, the first of which is, Whether the plaintiffs have a right to the proceeds of the cargo shipped by *O'Brien* under this charter-party? The goods were seized at *Hayti*, and sold by the act of the master, the agent of the defendants. Now this seizure was illegal. It is true, that by the maritime law a greater effect is given to the clause of penalty than by the law of *England* (a); but even this would not justify any court in giving both the freight *and the penalty*. Besides, the court at *Hayti* had no jurisdiction over the matter at all. The charter-party was executed in *England* by *English* subjects. The law of *England*, therefore, alone can take cognizance of it. At all events, if a foreign court has jurisdiction over the matter, it is only as ancillary, *Henry*, c. 6. p. 42. Now it is clear that, by the construction of our law, the freight was not at that time payable, though it might have been earned. (b) [*Best C. J.* But what jurisdiction had the court at *Hayti* at all?] It may be said that the vessel being at *Port-au-Prince*, and the proceeding being *in rem*, they gained a jurisdiction by this accidental circumstance.

The second point is, Was the homeward freight earned on account of the plaintiffs, so as to entitle them to maintain this action for it? Now it is true that they had no cargo to put on board at *Port-au-Prince*. But what ought then to have been done? The captain ought

(a) By the law of *England*, this sum is considered not as liquidated damages, but as an indemnity. The party, therefore, suing on a penal clause like this, cannot recover more than the damage actually sustained. *Abbott on Shipping*, part 3. c. 1. s. 6. On the other hand, he may recover damages beyond where they really exceed the amount of the penalty. *Ibid. Harrison v. Wright*, 13 East, 343.

(b) See *Smith v. Wilson*, 8 East, 437. *Havelock v. Geddes*, 10 East, 567. *Byrne v. Patterson*, Ab. on Sh. 347. *Gibbon v. Mender*, 2 B. & A. 17.

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to have come home in ballast, or put the ship up for freight on account of the plaintiffs. The remedy against them would have been by action upon the covenant, in the one case for dead freight, in the other for the difference of freight earned, and that due under the charter-party. *O'Brien* had made himself liable to a monthly payment according to tonnage, and he had a right to the use of the vessel as long as he pleased. There is, moreover, an express stipulation in the charter-party that the master shall not carry goods for any but the affreighter. Now he has carried goods, and therefore for the affreighter, or the plaintiffs who represent him.

Wilde Serjt. for the defendants. This action is not maintainable at all, for the goods attached had long ceased to be the property of the bankrupt. The proceedings disclose, that he had assigned the whole of the cargo to *Campbell, Bowden, and Co.* and Mr. *Wyke, Grant v. Hill.* (a) Besides, the seizure here was perfectly legal. The agents of the bankrupt inform the captain that there is no cargo. He is also made acquainted with the embarrassed circumstances of the bankrupt. And having a larger lien upon the goods by the law of *Hayti* than by the law of *England*, he chooses to pursue his remedy there. (b) Then as to the jurisdiction, what is to prevent a court abroad from pro-

(a) 4 Taunt. 384.

(b) The state of Hayti has adopted the Code Napoleon. Art. 280. of the Code de Commerce binds the cargo for the due performance of the covenants of the charter-party; and art. 507. gives the master a prior claim upon the goods for his freight for the space of a fortnight, unless they have in the meantime passed into the hands of third parties. He is not, however, allowed to retain them on board until the freight is paid; he can merely require that they shall be deposited in the hands of some third person, art. 506.

ceding upon the matter when they have the owners of the goods (who are the real defendants) in person, the goods themselves, and the agent of the plaintiffs before them? The freight he had clearly a right to, and the penalty he claimed on account of the breach of covenant in not furnishing a homeward cargo. The Court of *Hayti*, in adjudging the penalty, expressly proceed on the ground of a repudiation of the charter-party. (a) But even were the seizure illegal, still as it was done under the authority of a competent tribunal, it cannot now be called in question. The judgment of a foreign court cannot be opened in the courts here, unless the party relying upon it is seeking to enforce it here, *Phillips v. Hunter*. (b) [Best C.J. If the foreign court have jurisdiction? But why labour this, until the effect of the assignment is done away with by the Plaintiffs?]

Taddy in reply. The assignment to *Campbell* and *Bowden* did not convey the absolute interest in the goods to them. Else why should *Wylie* and *Sureau* and Co. be appointed the attorneys both of *O'Brien* and *Campbell* and Co.? It was evidently intended merely as a security, and not to operate unless the advances were not repaid. Now it does not appear that they were not repaid. The deed, if uncontrolled by matter subsequent, must have been supposed to convey the legal interest; but here it is qualified and explained away by what follows.

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(a) By the law of England there is no lien on the cargo taken out, for a breach of covenant on the part of the freighter, in not providing a full cargo, nor for demurrage, nor for pilotage or port charges, although the freighter may have engaged to pay them, Ab. on Sh. p. 171. *Phillips v. Rodie*, 15 East, 547. *Faith v. East India Company*, 4 B. & A. 630. And the word lien in its proper sense in the law of England, imports that the party is in possession of the thing which he claims to detain. Where there is no possession actual or constructive, there can be no lien." Ab. on Sh. Ibid.

(b) 2 H. Black. 410. per *Eyre Ch J.*

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Besides, the plaintiffs do not claim the *goods*; they claim to recover back the *money* which was illegally obtained from *O'Brien*. By reference to the judgment of the Court of *Hayti*, it appears that it was received *as money of O'Brien* the bankrupt. The defendants, having so received it, cannot now say that it was the money of other persons: they acknowledge to have received it from *O'Brien*, and they must now, therefore, account for it to his assignees. [He was then proceeding to argue on the irregularity of the proceedings at *Hayti* when he was interrupted by *Best C. J.*, who expressed himself perfectly satisfied on that head, and remarked that it was one of the first principles of justice, that a foreign court can have no jurisdiction over a party not in the country.]

BEST C. J. I am glad to be relieved from deciding this question on the law of nations. The first point raised by the case is, Are the plaintiffs entitled to recover the proceeds of the outward cargo? I think not; because it is stated in the case, that the bankrupt had assigned to *Campbell* and *Bowden* the goods in the hands of *Mr. Sutherland*, and appointed *Mr. Wylie* to act for them. To whom, then, in law, does this property belong? — To the assignee under that deed. It follows, therefore, that the plaintiffs could bring no action for this property, or for money, the produce of it. The validity of the proceedings at *Hayti* has no bearing on the present case. If it had, I should be strongly inclined to consider the whole of them as a nullity.

Then, as to the second point, viz. Whether the plaintiffs are entitled to the freight earned on the homeward voyage? It is impossible to suppose that they are. The cargo was not put on board until after the bankrupt had, by his agent *Wylie*, rejected all interest in the vessel, and for the *owners*. What was the captain to

do? one of two things. He had a right, either to go home in ballast and sue Mr. *O'Brien*, or to say, "I will take you at your word, and set up the vessel as a general ship for the benefit of my owners." It is true, that this does not get rid of the charter-party; for a deed can only be done away with by a deed; but at all events the cargo was not brought home for the bankrupt or the plaintiffs; for what would be the effect if the plaintiffs proceeded in the regular course? They could only sue upon the charter-party for not bringing home a cargo; to which the answer would be, "You had none to bring." It seems to me that there is no foundation at all for either of these claims.

BURROUGH J. (*a*) As to the last question, it does not appear to me that the plaintiffs can treat the freight earned as money had and received to the use of the bankrupt. And as to the first point, how could the bankrupt have any property in the goods after the assignment?

GASELEE J. concurred.

Postea to the defendants.

(*a*) Park J. had left the Court.

It should seem that in this case the court of *Hayti* had jurisdiction over the subject matter. If it had been a proceeding *in personam*, then the law of the place where the litigant parties were domiciled would have prevailed, on the ground that *mobilia sequuntur personam*; but it seems to be admitted by the civil writers, that where the proceeding is *in rem*, that state has jurisdiction in which the subject matter is. (*b*) Then if so, whatever irregularity, or even illegality,

(*b*) Voet. b. 5. tit. 56, 57.

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there might have been in its proceedings, the judgment of that court was binding, and could not be called in question here, unless by a party seeking to enforce that judgment. (a) That the freight earned on the homeward voyage was for the benefit of *O'Brien*, does not admit of much question ; but it is certainly doubtful whether it could be recovered in this form of action. If an action had been brought by the ship-owners for freight under the charter-party, the freighter could have set off the freight earned by the vessel. (b) But in this case the second question was altogether indifferent to the plaintiffs, for they were in this dilemma : — either the charter-party was put an end to by the circumstances which took place at *Hayti*, or it was not. If it were, then they were not entitled to the homeward freight. If it were not, then the owners might have sued for the freight due under the charter party, which would have exceeded the sum earned. It is, of course, in this view of the case taken for granted, that neither could the money obtained by legal proceedings at *Hayti* be recovered back, nor even the grounds of the decision upon which it was obtained be enquired into.

(a) *Burrows v. Jemimo*, 2 Str. 733. *Boucher v. Lawson*, Ca. temp. Hardw. 89, 90. *Roach v. Garvan*, per Lord Hardwicke, 1 Ves. 159. *Galbraith v. Neville*, and *Walker v. Witter*, 1 Doug. 1.; and see *Hunter v. Potts*, 4 T. R. 191. *Philips v. Hunter*, 2 H. Black. 410. and *Henley v. Soper*, ante, p. 38.

(b) Ab. on Ship. 200.

**PROMISSORY NOTE.—ADMISSION OF
DEBT.**

1828.

In the KING'S BENCH.—*Trinity Term.*

BISHOP v. CHAMBRE.

ACTION by payee against maker of a promissory note for 30*l.* There were also the usual money counts, and one upon an account stated. Pleas, non-assumpsit, statute of limitations, and infancy. Replication, that the cause of action accrued within six years, and that defendant promised to pay after he came of age.

At the trial it appeared that the note, which had been originally given for goods supplied, was dated as far back as 1814, and the person who applied on the part of the plaintiff for payment, being called as a witness, stated that he shewed the note to the defendant, telling him at the same time for whom he made the application; and that the defendant, on seeing the note, said, "Dear me! is that my hand?" The witness said, "I suppose so, as that is your name;" to which the defendant answered, "Bless me! I write a very different hand now. I know I owe him the money. I am sorry he did not apply earlier. I will send him the money." The note, when produced, appeared to have undergone some alteration in the date. There was an erasure, and the word "*May*" written over it. Lord Tenterden left it to the jury to say whether the promissory note had been altered after it was a perfect instrument in the hands of the plaintiff. The jury thought it had been altered, and found a verdict for the defendant. In the last term *Denman C. S.* obtained a rule calling on the

A promissory note, which was once a valid instrument, but by reason of a subsequent unexplained erasure not available as a promissory note, is admissible in evidence on the account stated.

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defendant to shew cause why a verdict should not be entered for the plaintiff for 30*l.* or such other sum as the Court should think fit.

Brougham now shewed cause. The plaintiff could not recover upon the note by reason of the unexplained erasure. His claim, therefore, rests solely on a supposed admission. Now, the acknowledgment made by the defendant in the conversation between him and the witness had reference strictly and exclusively to the note. Besides, no sum was spoken of by either party as due, and, therefore, unless the plaintiff can pray in aid the note, there is no evidence whatever of any particular sum to which he is entitled. Now, the note cannot be received in evidence for this purpose, first, because there was no acknowledgment by the defendant that the signature was in his hand-writing; and, secondly, because it was altogether void for the want of a new stamp. The question as to the effect and applicability of the admission was not, it is true, left to the jury; but neither was it necessary, that being a matter for the Court, and not for the jury, to decide. *Coltman v. Marsh* (*a*), *Swan v. Sorell*. (*b*)

Denman contra. The words used by the defendant amounted to an acknowledgment of the debt, and a direct promise to pay it. It is not necessary, therefore, to enquire whether there was any admission of the hand-writing. It is not upon the note that the plaintiff seeks to charge the defendant. The note was shewn to him; he saw that it was for 30*l.*; he made no objection to the amount, but said he would go round and get the money. [Lord Tenterden. If the note can be used as evidence of the amount, then the plaintiff is entitled to recover

(*a*) *5 Taunt.* 579.

(*b*) *2 B. & A.* 759,

that sum.] The note may be so used. It is true that an *unstamped* instrument cannot be read even as evidence of a contract; but this is the case of an instrument void in consequence of an alteration.

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Lord TENTERDEN. Your case is much stronger. In the way I left it to the jury, and by the verdict they gave, they found the note to have been once a valid instrument. I told them also that there was an express admission of the debt. We are of opinion that there was sufficient evidence of a promise to pay 30*l.*

Rule absolute for a verdict to be entered for the plaintiff for 30*l.*

It is clearly settled that a negotiable instrument which requires a stamp cannot, *after it has been issued*, be altered in any *material* part without a new stamp. (a) To recall it

(a) *Bowman v. Nicholl*, 5 T. R. 537. *Cardwell v. Martin*, 1 Campb. 79. 9 East, 190. *Knill v. Williams*, 10 East, 451. *Bath v. Taylor*, 15 East, 412. *Outhwaite v. Luntly*, 4 Campb. 179. *Watton v. Hastings*, 4 Campb. 225. *Maison v. Booth*, 5 M. & S. 226. per Bayley J. Whether the alteration took place after the issuing, is a question partly for the jury and partly for the court; for the former as to the time of the alteration, for the latter as to what amounts to an issuing. In general a bill or note is negotiated when it has passed into the hands of a payee; but if the bill be an accommodation bill, and the payee is a party in the transaction, it is not issued until it comes into the hands of an indorsee, who has given valuable consideration for it, and is thereby entitled to treat it as a security available in law. *Downes v. Richardson*, 5 B. & A. 674. A bill may be reissued without a new stamp, under peculiar circumstances, as in *Callow v. Lawrence*, 3 M. & S. 95. There the drawer of a bill payable to his own order, paid the amount after dishonour to the indorsee and holder. After striking out the names of all the parties to the bill except himself and the acceptor, he reissued it; and it was held not to require a new stamp, on the ground that it had not discharged its functions. It is plain, however, that in this case the drawer may be considered to have received the bill as indorsee of the person to whom he paid the amount, and it is then

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when it has been once negotiated, and again put it into circulation in a different form, is, in fact, to issue a new instrument. If, then, it could in this way be made available, without another stamp, it would be a manifest evasion of the stamp acts. The note, therefore, which was produced in the present case, and upon which the plaintiff sought to recover, must, after the finding of the jury, be taken to be a promissory note *unstamped*, and was, consequently, as a negotiable instrument, void. Then, could it be used in evidence for any collateral purpose connected with the same demand?

There is no doubt that a party who fails in his action upon the instrument may, in general, resort to other proof of the debt, and that an admission would amount to such proof. (a) The acknowledgment, therefore, of the defendant that he owed the money was, so far as it went, good evidence, though it was connected with, and immediately referred to, the promissory note. But it does not appear that there was any proof of a specific sum due, unless the note itself could be read for that purpose. Now it is a general rule, universally recognised by the courts, that an instrument unstamped, or even improperly stamped, cannot be used in evidence for the establishing, directly or indirectly, of the claim which is sought to be enforced upon the instrument (b); and it should, therefore, seem that, in the present case, the note was not admissible for that purpose of shewing the amount. (c) It does not, however, seem necessary to rest the case upon this; the defendant made an admission, but it was defective as to the sum due; he said, I know I owe the money, but he did not say what money. Then, what was the money? Had the Court any means of ascertaining it? It should seem that it had. If the witness who proved the acknowledgment knew what the sum in the note was (for it was

nothing more than a bill indorsed when over-due. What is a material alteration is also matter of law. For this see *Marson v. Petit*, 1 Campb. 82. *Trapp v. Spearman*, 5 Esp. N. P. C. 57. *Jacobs v. Hart*, 2 Stark. N. P. C. 45.

(a) *Farr v. Price*, 1 East, 57. and the cases in n. (a), *Ibid. Brown v. Watts*, 1 Taunt. 353.

(b) *Chamberlain v. Porter*, 1 N. R. 30. *Farr v. Price*, 1 East, 55.

(c) See *Green v. Davies*, 4 B. & C. 235.

that to which the defendant referred), independently of the note itself, he might, it is imagined, give parol evidence of that fact, nor would it be necessary to scrutinise the mode in which he obtained that knowledge. Nay, further, though he were then ignorant of the sum, might not the note be shewn to him for the purpose of refreshing his memory upon that point? (a) It does not, indeed, appear whether such evidence was given by him at the trial or not. If it were, the Court, *which is very guarded in its judgment*, was certainly warranted in holding that there was sufficient evidence of a promise to pay 30*l.* If it were not, then, perhaps, a new trial, for the purpose of obtaining that evidence, would have been the most regular course, though the result would probably have been the same.

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(a) This has been expressly held with respect to an unstamped receipt. *Jacob v. Lindsay*, 1 East, 460. The circumstances of that case were very similar to the present. There was an account current between the plaintiff and defendant, of goods and cash kept in a book of the plaintiff, each page of which was authenticated by the acknowledgment of the defendant in his own hand-writing. The cash received in each page amounted to more than 40*s.*, and the book could not consequently be given in evidence of such acknowledgment, for the want of a receipt stamp. The witness, however, who deposed to the admissions, was allowed to refresh his memory as to the amount, by reference to the book; the question of the admissibility of the evidence so obtained being reserved for the court; and upon argument they were unanimous that it was rightly received. See also *Rambert v. Cohen*, 4 Esp. N. P. C. 213. In this same term *Robinson* moved for a new trial of a case on the Norfolk circuit, on the ground that the following evidence had been improperly received. There was put into the hands of a witness, for the purpose of refreshing his memory, a memorandum in writing, signed with his initials, purporting to be a receipt for money, but inadmissible for the want of a stamp; upon looking at which he says, "I have no recollection of receiving this money, but I am confident, from seeing my initials there, that I did receive it." *Robinson* contended, that as the information was derived solely from the receipt, which could not be itself produced, it must be rejected altogether, and he argued (not without plausibility), that if this were not so, the instrument would be made use of as evidence of a fact which could not be obtained without it. But the court refused the rule, on the authority of *Jacob v. Lindsay*.

INCOMPETENCY OF WITNESS

1828.

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With respect to promises made after full age to pay debts contracted during minority, the statute 9 G. 4. c. 14., recently passed, requires that to be binding they shall be in writing.

The words of the fifth section are: "That no action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith."

INCOMPETENCY OF WITNESS ON THE GROUND OF INTEREST.

In the KING'S BENCH.—*Trinity* Term

EDMONDS v. LOWE.

Acceptor of bill of exchange is an incompetent witness on behalf of the drawer in an action by the holder.

The Court, however, will, under special circumstances, grant a new trial, that he may be released.

Action by holder against drawer of a bill of exchange for 198*l.*, accepted by *Stephen Bewzeville*.

On the trial of the cause before Lord *Tenterden* at *Guildhall*, the acceptor was called on the part of the defendant to prove, that after being accepted by him, and indorsed by the defendant (the drawer), the bill was put into his hands by the defendant for the purpose of getting it discounted; that he took it for that purpose to the plaintiff, who, having got hold of it, refused either to discount or return it, saying that he should keep it as security for a debt of 70*l.* owing to him from *Bewzeville*.

Campbell for the plaintiff objected that the witness was incompetent on the ground of interest; and Lord *Tenterden* being of that opinion, he was rejected. The plaintiff consequently recovered a verdict for 70*l.*

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In *Hilary* term last, *Denman* C. S. obtained a rule for a new trial, on the ground that the witness was improperly rejected, and also on an affidavit that the defendant arrived a little too late, or he would have given the witness a release.

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Campbell and *Patteson* now showed cause, and contended, as at the trial, that though the acceptor was liable upon the bill to both plaintiff and defendant, and, therefore, so far indifferent between them; yet as he would be liable also for costs to the defendant, if the plaintiff recovered in this action (the defendant being with respect to the acceptor in the nature of a surety upon the bill), this was such an interest in favour of the defendant as rendered him an incompetent witness for him.

Denman and *Chitty* in support of the rule said, that this was not such a predominant interest as to form a ground for exclusion; but that, even if it were, the evidence was admissible on the score of public expediency, on account of which agents were allowed to give evidence in behalf of their principals. That the acceptor in this case was called to speak to a transaction in which he acted not as *acceptor*, but simply as *agent*, of the drawer, a fact which must have been understood by the plaintiff; and they cited the case of *Barber v. Macrea* (a), contending that *Bewzeville* was merely the medium of conveyance, and, as it were, a *carrier* between the parties.

Lord TENTERDEN. We are of opinion that the witness was properly rejected. He was the acceptor of a bill of exchange drawn upon him by *Lowe*, and thereby guaranteed to *Lowe* that the bill should be paid by him-

(a) 3 Campb. 144.

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self. Now, this was an implied contract to indemnify *Lowe* from all costs and charges which he might be put to by reason of the non-payment of the bill: and, therefore, if the verdict were found against the drawer, he would be answerable to him for the costs of that action.

(a). It has been said, however, that we are to consider this as analogous to the cases where agents and *carriers* are admitted without a release; but we do not think the cases similar. The agents to whom the exception in the law of evidence applies, are agents *in the ordinary course of trade and commerce*. They are, in general, the only witnesses of the bargains and dealings which take place; and, unless they were allowed to give evidence of those dealings, commerce could not go on (b); but *Bewzeville* was not such an agent. The whole transaction arises out of the accidental circumstance of his being the acceptor of the bill. We are of opinion, however, that a new trial should be had, in order to give the defendant an opportunity of releasing *Bewzeville*, and shewing what passed between the plaintiff and him when he took the bill to be discounted.

Rule absolute accordingly.

(a) See *Jones v. Brooke*, 4 Taunt. 464. and the cases there cited
Phillipps's Evidence, vol. i. p. 56. et seq.

(b) Phil. Ev. vol. i. p. 120. et seq.

A bill was brought into the house during the last session, at the instance, it is believed, of the enlightened Chief Justice of the Court of King's Bench, to remove the disqualification of witnesses arising out of interest. For the present it stands over; but there is little doubt of the ultimate success of a measure, the effect of which would be to remove a manifest absurdity and inconvenience from the administration of the law, and render unnecessary the clumsy contrivances for doing justice, of which the present case is an instance.

1828.

VALUED POLICY.—SEA-WORTHINESS.In the KING'S BENCH.—*Trinity* Term.**TAYLOR v. SOUTH DEVON MARINE FIRE AND LIFE
INSURANCE COMPANY.****ACTION upon a valued policy.**

The defendants had a verdict at the trial upon evidence that the ship insured was unsea-worthy when she sailed; that she was so represented to the plaintiff before the voyage, and that he gave her very insufficient repairs; and also upon evidence, that in the policy she was valued much beyond her actual worth, viz. at 4000*l.*, whereas four years before she had been valued at 3600*l.* only.

Gurney, on the part of the plaintiff, moved for a new trial on affidavits that he was taken by surprise as to the line of defence adopted by the Company, and that ample proof could be given of the sufficiency of the repairs, and a satisfactory explanation of the difference in the valuation. But the Court refused the application, observing that, as to the sea-worthiness, if a new trial were to be granted on the ground of surprise in that respect, a like application would be made in every case where such evidence was given; and as to the other point, the plaintiff ought to have expected that he would be required to shew how the intermediate increase of value had arisen; more especially as on a *valued* policy, and in a question of sea-worthiness, the actual value of the ship must always be proved.

Rule refused.

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This is one of those cases in which mischief necessarily arises from the privilege of the defendant in pleading the general issue. If it be considered for a moment how numerous and how various are the answers which may be set up against a claim of this kind, it is most unreasonable to require that the plaintiff shall come prepared with evidence to meet, by anticipation, every possible case. It is, in effect, to say, that he who represents himself as injured shall come into court and expose himself to any attack which the person by whom he says he is injured, may think proper to make. Why give the defendant an advantage over the plaintiff? It may be said, the plaintiff cannot really be ignorant on what ground his claim is resisted, and ought therefore to be ready to support it. But here is a case to which the remark does not apply. There were affidavits of many persons that the vessel was in thorough repair. The plaintiff may therefore have reasonably supposed that she was sea-worthy, and if so, could hardly expect to be attacked on that score.

The only argument which has ever been brought forward in vindication of the general issue in actions of contract, rests upon the ground that the party, if really taken by surprise, may have a new trial; but the Courts are reluctant (we do not say improperly so), to grant them on this ground, and seldom, if ever, do so without imposing on the party applying the immediate payment of the costs of the former trial,—a condition in itself sufficiently hard. It is to be hoped that this anomaly in our law will soon be removed, and the practice restored to what it was before this abuse crept in.

**GOODS BARGAINED AND SOLD.—
SPECIFIC APPROPRIATION.**

1828.

In the KING'S BENCH.—Sittings in Bank after *Easter* Term.

**ATKINSON and Others, Assignees of SLEDDON v. BELL
and OTHERS.**

INDEBITATUS assumpsit for goods bargained and sold, and for work, labour, and materials.

The defendants, flax spinners and manufacturers at Whitehaven, on the 12th November 1825, wrote to a Mr. *Kaye*, the patentee of some improved machinery for the spinning of flax, requesting him to get made for them as soon as possible a roving-frame and two spinning-frames on the new construction. He accordingly gave directions to *Sleddon*, a machine-maker, and the work was commenced. The roving-frame was completed, and sent off according to the directions of the defendants; but the spinning-frames were delayed in consequence of successive intimations from the patentee, that further improvements were making in the construction.

The defendants had information of the reason of this delay, and by letter to *Sleddon* on the 3d of March assented to it. During the progress of the work, *Kaye* was frequently at *Sleddon's* premises superintending and giving directions, and in that time other frames were made by *Sleddon* upon *Kaye's* principle, and sent to other places. At length, in the following *May*, those destined for the defendants were completed, and packed up for carriage; and a letter was sent to them requesting instructions as to the mode of forwarding them. The defendants declined to receive them, and they remained in consequence upon the premises of *Sleddon*.

An action for goods bargained and sold cannot be maintained, unless there has been a specific appropriation of the particular goods assented to by the buyer.

Nor an action for work and labour, unless the article on which it is bestowed is the property of the person who orders it.

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till the 23d of *December*, when a fire broke out, and consumed them. *Sleddon* had in the meantime become bankrupt, and his assignees brought this action to recover the value both of the roving-frame and the two spinning-frames. The price of the former was paid into court, and the question therefore was confined to the latter.

At the trial before *Hullock* Bar. at *Lancaster*, in the summer of 1827, the defendants set up as an answer to the demand, that the order had been countermanded, and that an unreasonable delay had taken place in executing it. The jury, however, negatived both these grounds of defence, and the plaintiffs recovered a verdict, leave being given to the defendants to move to set it aside and enter a nonsuit, on the ground that the action in its present form could not be maintained. Subsequently, however, the learned Judge nonsuited the plaintiffs absolutely, throwing upon them the burthen of applying to the court above. Accordingly in *Mich. Term* last, *Cross Serjt.* obtained a rule *nisi* for setting aside the nonsuit, against which *Brougham* on a former day, and now *Parke*, shewed cause.

First, no action will lie for goods bargained and sold; unless there has been a specific bargain for specific goods, and unless every thing has been so far done that the purchaser might bring an action of trover for them on tendering the price. Now here there has been no such bargain; the goods were not in existence at all. It was merely an order to make them in a certain way. The defendants never accepted these particular machines, nor agreed that they should be theirs. So long as there is an uncertainty as to the goods, the contract is executory; and the plaintiffs, if they could recover at all, ought, therefore, to have brought a special action on the case for refusing to accept. If the property of these goods had not vested in the defendants, then this form

of action cannot be sustained; and this may be tried in four ways. A loss has happened by fire: Whose loss was it? Was the property of the seller or the buyer destroyed? *Sleddon* became bankrupt. On the bankruptcy did the property in these machines pass to his assignees, or was it vested absolutely in the vendor? Suppose *Sleddon* had parted with them to another, could the defendants have maintained trover against him, or would not their remedy be rather on the special contract to make and deliver the goods? Lastly, suppose an execution to have issued against the defendants, could these machines have been seized under it, as their property? The result of all these criteria is, that the contract remained executory. It might have been fulfilled, by making other machines as good, and delivering them to the defendants. These, therefore, were never their property at all. It is true, that by bargain and sale the property does in general pass to the vendee; but then it must be a sale of certain specific goods set apart and appropriated to the purchaser. If the agreement be for a commodity *not seen* by the orderer, and, therefore, not accepted, then, if the seller subsequently send, or is ready to send a commodity of the kind which was ordered, and the buyer refuse to receive it, he may indeed sue him, but it must be on the special contract for not accepting, and not in *indebitatus assumpsit* for goods bargained and sold. *Mucklow v. Mangles* (*a*) is an authority to shew, that no property in the chattel bargained for vests in the orderer, until it is finished and delivered, even though the price have been paid beforehand. That case, therefore, is stronger than the present. [*Goode v. Langley* (*b*), and the opinion expressed by *Littledale* J. in *Simmons v. Swift* (*c*), were also alluded to.]

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(*a*) 1 Taunt. 518. (*b*) 7 B. & C. 26. (*c*) 5 B. & C. 857.

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Neither, secondly, can the count for work and labour be sustained. The work was performed on a commodity, not of the defendants', but of *Sleddon's*. To support the count for work and labour, it must be bestowed on some article belonging to the Defendant. The only case which at all leads to a contrary supposition, is *Towers v. Osborne* (*a*), which is of doubtful authority. In *Garbutt v. Watson* (*b*), Lord Tenterden remarked that it was an extreme case, and not to be carried further. At all events, there is no cause of action until the commodity on which it is bestowed is delivered. A tailor, who made a coat for another of cloth provided by himself, would have no right to say that it was work and labour on account of the orderer, until that upon which it was bestowed had been approved and accepted by him. But this was not a contract of work and labour at all; it was, if anything, a contract of sale. *Garbutt v. Watson* (*c*), *Thompson v. Maceroni* (*d*), *Hagedorn v. Laing* (*e*).

Cross, Serjt., and *Tomlinson* *contra*. Both counts, it is admitted, may be maintained if there was a specific appropriation of the goods to the defendants after they were finished. Now, here there was such an appropriation. *Kaye* was the agent of the defendants. The letters proved at the trial contained abundant evidence of his authority to act for them in respect of these machines. An appropriation, therefore, by him, was an appropriation by the defendants. Now it appears, that throughout the whole period, whilst they were making, *Kaye* was frequently giving direc-

(*a*) 1 Str. 506.

(*b*) 5 B. & A. 613.

(*c*) See the opinions of *Bayley* J. and *Holroyd* J. in that case.

(*d*) 3 B. & C. 1.

(*e*) 1 Marsh. 518. This case, as reported in *Taunton*, does not give the point for which it was cited.

tions about the particular machines destined for the defendants. Even after they had been once completed, they were by his order and under his superintendence altered according to an improved plan. This act, therefore, was a singling out and adoption of those specific machines as the machines of the defendants; and, taken in this view, therefore, it was a purchase of specific goods with a direction to alter them. *Thompson v. Maceroni*, and *Simmons v. Swift*, were cases of goods sold and delivered, and cannot, therefore, apply to this case. It is not pretended here that there was an actual delivery. *Mucklow v. Mangles* was qualified by the judgment of the Court in *Wood v. Russell* (*a*), which case governs the present. [*Bayley* J. There the price was to be paid by instalments.] Although not strictly analogous, the principle is the same; it is, that any exclusive appropriation at once vests the property in the orderer. The point was merely taken in argument in *Goode v. Langley*, and nothing was determined upon it by the Court. It is said that other machines might have been substituted for these; but from the nature of the property that could not have been done without the licence of *Kaye*, the patentee. Again, it is said that they were the property of *Sleddon*. How so? He could neither use nor sell them without *Kaye's* licence. Could they have been taken in execution as *Sleddon's* property? No; for the moment they assumed the form protected by the patent, the sheriff could make no title to them without the concurrence of *Kaye*. Any property, therefore, which *Sleddon* could have in these machines would be of a very modified nature, and much slighter acts of appropriation will suffice here than in ordinary cases. Yet in *Rhode v. Thwaites* (*b*), a mere selection of the

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assenting to their being set apart and destined for them, that would have been an appropriation. But it is said that what was done by *Kaye* at an earlier period was an assent. I think, however, that what was done by him in this respect would not bind the defendants. And that there was, therefore, no appropriation adopted by them.

Then, secondly, can the count for work and labour be sustained? I think not. The article on which the labour is bestowed must be the property of the employer. The contract here is substantially a contract of sale, not work and labour. But, as I think the Plaintiffs might have recovered in an action against the defendants, for not accepting, I am willing to make the rule absolute for a new trial, with liberty to the plaintiffs to amend their declaration accordingly, on condition of their paying all costs.

HOLROYD J. I have had considerable doubts whether an action would lie for goods bargained and sold. But I now think that there was not a sufficient appropriation, because there was no assent on the part of the defendants to these particular frames. As to the second point, it seemed to me, for some time, that as the work had been ordered by the defendants; it was work and labour done for them. But, inasmuch as the substance and materials were entirely provided by the workman, I agree that the work was for the plaintiffs themselves.

LITTLEDALE J. To support an action for goods bargained and sold, there must be a *sale*. Now there can be no sale, unless there be an assent on the part of the person who is to take the goods to accept those particular goods. Here there was no such assent. *Sleddon* might have substituted others, and have sold these to a third

person. The defendants could not, if this had been done, bring trover against the person to whom they were sold.

Then the work, labour, and materials were bestowed for the purpose of ultimately effecting a sale ; and it was therefore for the benefit of the plaintiffs; not upon property of the defendants.

The rule was made absolute, on the conditions suggested by *Bayley J.*

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LIABILITY OF PARTNERS.

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In the KING'S BENCH.—*Trinity* Term.

The SOUTH CAROLINA Bank *v.* CASE and Others,
Assignees of CROWDER and PERFECT.

BECKETT and Another *v.* SAME.

THESE were two issues, directed by the Vice-Chancellor, to try whether the bankrupts and *James Butler Clough* were, on the 13th of August 1825 (the date of the commission), indebted to the plaintiffs in each case in any, and what, sum of money.

The causes came on for trial before Mr. Baron *Hullock*, at the Summer assizes, 1826, for the county of *Lancaster*, when verdicts were found for the plaintiffs, subject to the opinion of the Court on cases, the substance of which was as follows:

In 1815 *Clough* entered into articles of copartnership with *Crowder* and *Perfect*, for carrying on the business of consignee or factor for persons trading between *England* and the *United States*, and such other business as should be mutually agreed upon. The firm was to be *Crowder, Clough, and Co.*, and the partnership was to continue four years. *Perfect* was to proceed to the *United States* to advance the business of the house as consignees or factors, and in such other manner as might best answer the purpose of the partnership. No one of the parties was to carry on the business on his separate account, nor be concerned in any other and distinct trade or partnership, nor carry on any trade in the name or on account of the partnership firm, without

A partner of a house in England, trading in America on the partnership account, but transacting all the business in his own name, indorses bills for partnership purposes in his own name only: Held, that upon this indorsement the firm was liable.

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the consent in writing of each of the parties. *Perfect* accordingly went and transacted the business of the firm in *America*, entirely, however, in his own name. In 1819 the term of the partnership was extended two years farther; and in 1821 was again renewed for other two years, *Clough* being appointed to succeed *Perfect*, who had returned home, in the management of the concern in *America*. The stipulations of the partnership remained in all material points the same. Previous to *Clough*'s departure written instructions, approved and signed by *Crowder* and *Perfect*, were given him for his guidance. In these he was directed to make no shipments solely on account of the firm, and when necessary, in order to procure consignments, to take a share in a risk, it was to be limited to 5000*l.*; the greatest precaution was to be used in ascertaining the safety of the adventure, and such speculations were to be avoided as much as possible. There was also this clause: "It is understood that our names are not to appear on either bills or notes for the accommodation of others, and that they should appear as little as possible on paper at all, and then only as regards direct transactions with the house here." A discretion, however, was allowed to *Clough* to act as he thought best for the benefit of the concern, on the ground that "the object of having a branch of the establishment on each side of the *Atlantic* would be frustrated unless some license were allowed to each party to regulate himself by circumstances;" but this license was again qualified by a strong caution against improvident speculation. *Clough* proceeded to the *United States*. The business there, which consisted principally in the buying and selling of goods, and the collecting of freights on commission for principals in *England*, was carried on in the name of *J. B. Clough* alone; the business in *England*, which consisted in doing

the same for principals in *America*, in that of *Crowder, Clough, and Co.* *Clough* occasionally joined in purchases of cotton, to secure consignments; and sometimes, notwithstanding the prohibition in his instructions, bought cotton on speculation, and trafficked in the buying and selling of bills. The sale and purchase of goods in *America* for principals in *England* were also made in the name of *J. B. Clough*, but the profits on all these transactions were regularly carried to the account of the partnership.

In order to obtain consignments, the firm made advances, or gave or indorsed bills of exchange, to their principals in the *United States*, on the faith of goods consigned; and the mode of doing this was as follows:

In some cases bills were drawn in the name of *J. B. Clough* upon *Crowder, Clough, and Co.* in favour of their principals, to whom they were delivered. In others bills were drawn by the principals upon *Crowder, Clough, and Co.*, payable to *J. B. Clough*, indorsed by him, and so delivered to the principals. Sometimes, again, bills were drawn by *J. B. Clough* on *Crowder, Clough, and Co.* in favour of the consignors, which being sold, the proceeds were handed over to them. Lastly, at *Charleston*, where bills on *England* were not always negotiable, *Clough* used to raise money for advances by delivering to the consignors bills drawn by himself on *American* houses in *New York* in their favour, and providing for these by sending to the *American* houses bills on *England* to be discounted there. All these different classes of bills were regularly accepted and paid by *Crowder, Clough, and Co.* until the bankruptcy.

Proper partnership books were kept by both parties, in which all the transactions of each branch were entered; and at the end of each year the annual balance of profit and loss in *England* and the *United States* was

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divided among the partners; considerable gains having been derived for some years from the transactions of *Clough* in *America*.

During the whole period of his stay in *America* down to the bankruptcy, *Clough* had never traded or carried on any business, nor drawn, indorsed, or negotiated any bills of exchange on his own separate account; but had entered in his own name into a joint speculation, as on a partnership account, with two others, of the names of *Weyman* and *Lazarus*, to the extent of 100,000*l.*; and the transaction, though contrary to the partnership agreement, and the instructions which had been given him, was afterwards adopted by the partners in *England*. He had no individual business whatever, and the name of *J. B. Clough* was never used by him in the transactions of trade, except for the benefit, and on account of, the partnership. Indeed all the partnership business in the *United States* was carried on in that name, and no other, except when the consignors drew on *Crowder, Clough, and Co.* on account of their consignments.

Clough, who was the only witness examined at the trial, swore that there was no specific agreement between him and his partners that there should be a house in *America* under the name of *J. B. Clough*; that he was sent out to form a branch of the house there, and had instructions not to use their name; that the branch was carried on there in the name of *J. B. Clough*, with the sanction of all the three.

The particular transaction which gave rise to the first of the two cases was the following: *Clough* obtained from *Weyman* of *Charleston* consignments of a large quantity of cotton to the house of *Crowder, Clough, and Co.*, for sale on *Weyman's* account; and there being a difficulty in negotiating bills on *England* at *Charleston*, it was agreed between *Weyman* and *Clough*, for the pur-

pose of procuring advances to the former on the credit of the consignments, that *Weyman* should draw bills on *Coffin* and *Weyman* of *New York*, merchants, payable to *Clough*, and that *Clough* should indorse them, on the understanding that the *South Carolina* Bank would then discount them. Four bills were accordingly drawn by *Weyman* on *Coffin* and *Weyman* for 50,000 dollars, payable to *J. B. Clough* or order; which, being indorsed " *J. B. Clough*," were discounted by the Bank, who are a corporation duly constituted by the laws of the *United States*. It was further agreed between *Clough* and *Weyman* (the consignor) that the latter should draw other bills on *Crowder*, *Clough*, and Co., in order to provide *Coffin* and Co. with cash to pay the four bills when at maturity; which latter bills were to be paid by *Crowder*, *Clough*, and Co. out of the proceeds of the consignments in their hands. Bills were accordingly so drawn and sold by *Coffin* and Co. to the amount of 5000*l.* This house, however, soon afterwards stopped payment, and the proceeds of the bills were misappropriated; and *Crowder*, *Clough*, and Co. also failing, the bills on them were not honoured. All the consignments, however, agreed to be made by *Weyman* to the house in *England* were made, and received and disposed of by them. The bills in question were presented to *Coffin* and Co. at maturity, and were dishonoured; of which due notice was given to *J. B. Clough* in *America*.

The circumstances of the other case were the following: In 1825 *Clough* authorized Mr. *J. Magson* of *Charleston* to draw on *Crowder*, *Clough*, and Co. in consideration of consignments made to them. He accordingly drew on that house two bills, one for 593*l. 4s. 5d.*, the other for 600*l.*, in favour of *J. B. Clough*. These also were indorsed " *J. B. Clough*," and discounted for *Magson* by *Beckett* and *Davies*, merchants

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at *Charleston*. After the bills were drawn, and before they were discounted, Mr. *Davies* applied to *Clough* to know whether he had authorized Mr. *Magson* to draw on the *English* house, and was informed by him that he had authorized him, and would indorse the bills. They were presented for acceptance, and, in due course afterwards, for payment to the house at *Liverpool*, but were dishonoured; of which due notice was given to *J. B. Clough* in *America*.

The question, therefore, for the opinion of the Court was, Whether upon these facts (*J. B. Clough* having no separate estate) the estate of the bankrupts was to be charged with these bills: the plaintiffs contending that the firm was bound both by the indorsement and verbal acceptance of *Clough* in the second of the two cases, and by his indorsement in the first; the defendants, on the other hand, maintaining that *Clough* alone was liable individually.

Parke for the plaintiffs. The bills in question were drawn on account of partnership business, and discounted with the name of *J. B. Clough* upon them. The short question then is, Is this the name of *Clough* separately, or is it his name as one of the partners, representing the *American* branch of the firm? Under the circumstances detailed in this case, the firm is as much bound by this indorsement as if it had been expressly made in the name of *Crowder, Clough, and Co.* The case of *Emly v. Lye* (a) will be cited against this position; and it will be said that the name of a single partner was there holden to bind only the individual, though the bill was discounted for partnership purposes. But in that case the name of the individual was never used as re-

(a) 15 East, 7.

presenting the firm, whereas it is clear that a partnership may carry on business in the name of an individual. *Ex parte Bolitho* (*a*). Is then the name *J. B. Clough* the name of the individual, or is it a partnership name? Now the case states, that by the articles of partnership a part of the business was to be carried on in *America*; that the transactions in the *United States* were carried on in the name of *J. B. Clough*; that he never transacted any business there on his own account, and that no other name was ever used, except when bills were drawn on the house in *England*. That in fact *Clough* had instructions from the house not to use the name of the firm in *America*; and that although no specific agreement was entered into in this respect, yet the business was conducted in his name with the express sanction of all the partners. The house in *England* have adopted the transactions of *Clough*, and have had the benefit of them, and now they say your only remedy is against Mr. *Clough*, who it appears has no separate estate. An extensive concern has been carried on in *America* for the joint interest of all, in which the name of *Clough* has alone been used. It is, therefore, the name of the firm there. Besides, these discounts were made for the accommodation of *Clough*, as one of the partners, and came, therefore, in the shape of a loan to the firm. And in *Denton v. Rodie* (*b*), Lord *Ellenborough* held, that the firm was liable for money so raised by one of the partners in *America*.

Patteson for the defendants. *J. B. Clough* is a separate name, and the plaintiffs have their remedy only against him. In the first of the two cases before the Court, bills were drawn by *Weyman* on *Coffin and Co.*

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(*b*) 3 Campb. 493.

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payable to *Clough*, indorsed by him, and discounted by the *South Carolina* Bank; the proceeds were then advanced to *Weyman*. These bills, therefore, cannot be considered to have been drawn for the use of the partnership; they were merely for the accommodation of *Weyman*, and were discounted for his advantage. In this instance the name of *Clough* must have been used as a separate and individual name, otherwise he would have been acting directly contrary to the clause in his instructions, which is set out in the case: "It is understood that our names are not to appear on either bills or notes for the accommodation of others." The authority of a partner to bind the firm cannot go beyond his instructions. *Clough*, therefore, could not have intended to pledge the partnership by this act. He indorsed the bills in his own name and on his own account, and the credit was given by the Bank to him individually. [*Bayley* J. The view of the case taken by the plaintiffs might make the house liable in two ways.] It would have been liable on the counter acceptances. Had the bills drawn on *Crowder, Clough, and Co.* to provide *Coffin and Co.* with funds been accepted, the house would have been twice liable. From the mode of transacting the business and negotiating the bills, it must have been notorious in *America* that there was a firm of *Crowder, Clough, and Co.*, and the name of *J. B. Clough* could hardly, therefore, have been considered as the partnership name. *Emly v. Lye* is a strong authority in favour of the defendants, the only difference being that there the individual carried on business also in his own name. The case of *Denton v. Rodie* cannot help the plaintiffs, because if they recover at all, they must recover as indorsees of the bills. Their claim rests solely on the bills; and the question, therefore, really is, as has been stated: did *Crowder, Clough, and*

Co. carry on business in *America* in the name of *J. B. Clough* alone? Now, although the case finds that he had no transactions in *America* on his own account, yet this would not be known there. Neither does it appear from the instructions that there was to be a firm in *America* under that name. *Clough* was a partner of the *English* house, sent out for the purpose of procuring consignments, with particular instructions from the other partners, of which one was, that he was not to draw bills in the name of the firm for accommodation. He had, therefore, no authority to bind them in the way attempted. [*Bayley* J. If the plaintiffs did not know that it was a partnership name, and gave the credit to *J. B. Clough* individually, then their remedy is against him.—*Lord Tenterden*. My difficulty is to distinguish this case from that of *Emly v. Lye.*] *Parke*. There the name was not a partnership name. [*Lord Tenterden*. Neither here does the case find that the name of *J. B. Clough* was known at *Charleston* as a partnership name.] *Parke*. It is not necessary that it should. It is sufficient if it were in fact a partnership name. [*Lord Tenterden*. Then were the instructions strictly followed?] (a) *Parke*. It was a partnership transaction, and the instructions were followed in all that was material; something was left to the discretion of *Clough*. *Patteson*. The discretionary clause does not apply to this transaction. [*Bayley* J. Were the bills drawn by *Weyman* on *Crowder, Clough, and Co.* accepted?] *Parke*. No. The house had failed. [*Lord Tenterden*. What do you say about the second case?] *Parke*. It is similar in all respects except this, that the bill was there accepted also by *J. B. Clough*, and there is, therefore, this further question, whether the firm were bound by that acceptance. Now is not an authority to

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draw on the firm, an authority to accept on account of the firm?

Cur. adv. vult.

The judgment of the Court was delivered in *Trinity* term by Lord Tenterden C.J., who, after reading the second case, said, If the bankrupts are to be charged, it must be as indorsers of the bills. We are of opinion that they are answerable as indorsers, and our judgment is founded on this: that the name of *J. B. Clough* used in *America* was the partnership name of the firm there.

The *South Carolina* Bank case stands on the same grounds, and *J. B. Clough* we think was there also used as a partnership name in *America*.

Postea to the plaintiffs.

The authority of a partner to bind the firm, more especially as regards negotiable securities, and the extent and limitations of that authority, are matters of so much importance that they ought to be thoroughly understood by every man in trade. It may be useful, therefore, to sum up, very briefly, the law on this subject.

Each partner of a firm is held out to the world, by the rest, as one in whom they repose confidence, and who is authorized to act on behalf of the whole. Accordingly, whenever one partner draws, accepts, or indorses bills or notes *expressly in the name, and ostensibly on account of the firm*, the partnership is bound by his act; and this, it seems, although the transaction be expressly contrary to the stipulations of the partnership, and the usual course of dealing, if it be done with reference to partnership business (*a*): nay, even though it be in fraud of the copartners;

1 Salk. 126.
292. Ld.
Raym. 1484.
12 Mod. 345.
7 T. R. 207.
1 East, 48. 51.
7 East, 210.
13 East, 175.
8 Ves. 542.
15 Ves. 286.
7 B. & C. 638.

(*a*) 11 Mod. 40: 12 Mod. 446.; and see the observations of Abbott C. J. in *Sandilands v. Marsh*, 2 B. & A. 678, 679. from which this inference is collected. "It has," he says, "undoubtedly been held, that in a matter wholly unconnected with the partnership, one partner cannot bind the others. But the true construction of the

if, for instance, it be done in discharge of the individual debt of the one partner, or the proceeds be in any other way applied to his separate use. (a)

In either of these cases, however, it will be necessary for the holder to shew that he gave value for the instrument (b); and if it appear that at the time of his taking it he was apprized that the transaction was a fraudulent one as respects the other partners, that, for example, it was to be applied to the discharge of a separate debt of the one, without

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rule is this, that the act and *assurance* of one partner, made with reference to business transacted by the firm, will bind the rest." And again: "To illustrate this proposition, a case may be put where two persons, in partnership for the sale of horses, *should agree between themselves* never to warrant any horse, yet though this be their course of business, there is no doubt that if, upon the sale of a horse, the property of the partnership, one of them should give a warranty, the other would be thereby bound;" and see *Grant v. Hawkes*, reported in Chitty on Bills, p. 31. note.

(a) *Swan v. Steele*, 7 East, 210. *Ridley v. Taylor*, 13 East, 175. *Baker v. Charlton*, Peake's N. P. C. 80. *Lane v. Williams*, 2 Vern. 277. 292. *Ex parte Bonbonus*, 8 Ves. 542. In that case Lord Chancellor Eldon said, "It is a principle very difficult to maintain, that if a partner for his own accommodation pledges the partnership, as the money comes to the account of the single partner only, the partnership is not bound. I cannot accede to that: I agree, if it is manifest to the persons advancing money, that it is upon the separate account, and so that it is against good faith that he should pledge the partnership, then they should shew that he had authority to bind the partnership. But if it is in the ordinary course of commercial transactions, as upon discount, it would be monstrous to hold that a man borrowing money upon a bill of exchange, pledging the partnership without any knowledge in the bankers that it is a separate transaction, merely because that money is all carried into the books of the individual, therefore the partnership should not be bound. No case has gone that length." In *ex parte Goulding* (sittings after Trinity term 1826), cited by Mr. Deacon in his Treatise on the Law and Practice of Bankruptcy, the Vice-Chancellor is said to have held, that an acceptance by one partner in the name of the firm, in satisfaction of his own private debt, and without the knowledge of his copartner, did not bind the joint estate; but there must, it is apprehended, have been something beyond this disclosed in the affidavits, as that the party taking the security was privy to the fraud; see also *ex parte Kirby*, Buck. 511.

(b) *Grant v. Hawkes*, supra.

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the concurrence of the rest, he cannot avail himself of the security against the firm. (a) Still, if from any subsequent circumstances an adoption of the act by the rest can be clearly shewn, the legal inference of a previous authority will rise, and the remedy of the holder against the partnership will revive. (b) The authority of one partner to bind the firm being merely implied from the relation of the parties may, of course, be rebutted by express notice previously given to the party taking the security from one of them, that the firm would not be bound by his acts. (c)

It was said generally that the act done must be in the *name of the firm* (d), and with respect to the drawing and indorsing this is certainly so. The partnership must appear by the signature. In the acceptance the rule, though in principle the same, is, apparently, somewhat different; — for it seems that if the bill be drawn upon the firm, and accepted by one of the partners in his own name during the continuance of the partnership, this will be binding upon the firm. (e) In principle, as was remarked, this is perfectly consistent. The authority of a partner is presumed. The only remaining requisite, therefore, is, that it shall appear upon the instrument to be a partnership transaction, and in the case supposed it does so appear. Partners in a par-

(a) *Sheriff v. Wilkes*, 1 East, 48. *Arden v. Sharp*, 2 Esp. N. P. C. 524. *Wells v. Masterman*, 2 Esp. N. P. C. 731. *Ex parte Peele*, 6 Ves. 602.

(b) *Ex parte Bonbonus*, 8 Ves. 542.

(c) *Lord Galway v. Matthews*, 10 East, 264.

(d) But one partner may act by procuration for the firm, per Holroyd J. in *Williamson v. Johnson*, 1 B. & C. 149. *Lord Galway v. Matthews*, 1 Campb. 403. This last was the case of a promissory note, beginning "I promise to pay," and signed "for A. B. and Co., A." And it is not necessary that the partnership name should be of the persons actually composing the firm; it is sufficient that the firm is known by the designation upon the instrument, and that it is the practice of the house so to designate it. *Williamson v. Johnson*.

(e) *Mason v. Rumsey*, 1 Campb. 384. "If," says Lord Ellenborough, "a bill of exchange is drawn upon a firm, and accepted by one of the partners, he must be understood to exercise his power to bind his copartners, and to accept the bill according to the terms in which it is drawn." *Dolman v. Orchard and Others*, 2 Carr. & Payne's N. P. C. 105.

ticular adventure, not being general partners, are not contemplated in these rules; for it has been holden that they are not liable, even to a *bond fide* holder on a bill issued by one of them in relation to a different concern.(a)

A *secret* partner also is protected against the acceptance of one partner in a transaction not relating to the partnership; and this on a very plain principle, viz., that as he had no interest in the bill, neither was it taken on his credit, there is no reason, either of equity or public expediency, why he should be liable upon it.(b) If the partnership be interested in the transaction, a dormant partner, though unknown to the taker at the time when the security was given, is liable as soon as he is known.

Where a firm is changed by the adoption of a new partner, he will not be liable on securities given by the firm, without his consent, in respect of debts due from the old partnership, if the party taking the security had, at the time, either actual notice, or from circumstances must have known that the transaction was without the concurrence of the new partner.(c) And, conversely, the firm will not be liable on securities given by the new partner, in the name of the firm, for the purpose of raising the capital necessary to his introduction into the firm.(d)

Where a partner retires from the firm, it will be necessary for him, not only to give public notice in the Gazette of the dissolution, but also to send a circular announcing the fact

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(a) *Williams v. Thomas and Others*, 6 Esp. N. P. C. 18. It is difficult to reconcile the facts, as there stated, with the judgment given by Lord Ellenborough. Thus much, however, is clear. The defendants were part-owners of a ship, of which the defendant Thomas was captain. The plaintiff was payee of a bill drawn on all the defendants, and accepted by Thomas on his own account. Lord Ellenborough said the drawers could give no better title to the holder than they had themselves; they could not draw for a general account, but for the account of the ship only; they could not bind the defendants by the acceptance of Thomas upon a bill drawn for an account unconnected with the ship. *Wood v. Holbeck and Others*. Cor. Abbott C. J. at Guildhall, 20th May 1826, cited in Chitty on Bills, p. 53.

(b) *Lloyd v. Ashby and Others*, 2 Carr. & Payne's N. P. C. 138.

(c) *Sheriff v. Wilkes*, 1 East, 48. *Hope v. Cust*, there cited.

(d) *Green v. Deakin and Others*, 2 Stark. 347.

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to all the customers of the firm (*a*), otherwise his liability will continue. And, even after these precautions, if he continue to take any part in the management, or by any negligence suffer himself to appear to the world as still connected with the concern, he will be liable upon a bill drawn, accepted, or indorsed in the name of the old firm (*b*), though the holder himself knew of the dissolution. (*c*)

An act of bankruptcy committed by one of the partners, followed up by a commission and assignment (*d*), determines the partnership. It has, consequently, been held that an indorsement by one of the firm, who had previously committed a secret act of bankruptcy, conveyed no interest in the bill binding upon the partnership funds; because, after a commission issued, the partnership stock was vested, by relation from the act of bankruptcy, in the solvent partner and the assignees of the insolvent, as tenants in common. (*e*) Still, for the benefit of trade, and the security of *bond fide* holders, it has also been determined, that a bill accepted by one partner in the name of the firm, after an act of bankruptcy committed by him, but before the issuing of a commission, is available as against the solvent partner. (*f*) So much for the acts of the *insolvent* partner after an act of

(*a*) 1 Stark. 418.; and see the case of *Wrightson v. Pullan*, 1 Stark. 575., where a distinction is taken on this very ground.

(*b*) *Newsome v. Coles*, 2 Campb. 617. *Williams v. Keats*, 2 Stark. 291. In *Williams v. Keats*, A. and B. had dissolved partnership, and advertized it in the Gazette. A. afterwards accepted a bill, bearing a date previous to the dissolution, for the accommodation of a third person, who indorsed it for value; and B., having suffered his name to remain over the shop as a member of the firm after this transaction, was held liable as a partner to the *indorsee*.

(*c*) *Brown v. Leonard*, 2 Chit. Rep. 120.

(*d*) It is stated by Mr. Chitty, in his valuable Treatise on Bills, that an act of bankruptcy *ipso facto*, determines the partnership; but the proposition cannot be sustained to this extent.

(*e*) *Ramsbottom v. Lewis*, 1 Campb. 279. *Thomason v. Frere*, 10 East, 418. *Barker v. Goodair*, 11 Ves. 78.; see also *Abel v. Sutton*, 5 Esp. N. P. C. 108.

(*f*) *Lacy v. Woolcott*, 2 D. & R. 458. The Court thought the point too clear for argument. It does not appear that the indorsement, in either of the cases above cited, was *in the name of the firm*.

bankruptcy. With respect to those of the *solvent* partner, it is clear that *at law* he is considered to have a lien upon the partnership funds in respect of debts contracted by the firm previous to the bankruptcy; and, consequently, that his indorsement, and, of course, therefore, his draft or acceptance given, with a knowledge of the bankruptcy, to a creditor of the firm in satisfaction of his debt, is binding upon the partnership effects. (a) In equity the proposition has been broadly laid down that a separate commission overreaches all transactions affecting the joint property by relation to the act of bankruptcy. (b) But there does not, if the matter be rightly considered, appear to be any substantial inconsistency in these determinations, because the cases in equity have been acts done as against the partnership estate, *without the assent of the solvent partner*; in which, consequently, he had not the opportunity of exercising his privilege of lien on the partnership assets, the privilege being strictly a personal one.

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(a) *Harvey v. Crickett*, 2 M. & S. 336. Lord Ellenborough there says: "The doctrine that the bankruptcy of one partner is to all purposes a dissolution of the partnership, has been pushed to an extent which the law does not warrant. For future purposes it may operate as a dissolution, so as to prevent the solvent partner from dealing with the partnership property, as if the partnership continued; but most certainly he has a lien on the joint funds in his hands in respect of all claims which were consummate at the time of the bankruptcy." And Mr. Justice Bayley adds: "If several persons enter into a partnership, either for a definite or an indefinite time, each partner is at liberty to apply the joint funds in payment of the partnership debts; and each has a lien on those funds for his own indemnity, limited to their being applied to the payment of partnership debts. When one of several partners becomes bankrupt, he puts himself by that act out of the partnership, and ceases to have any further control over the partnership property; the whole of his rights pass to his assignees. But this does not prevent the remaining partners from exercising the control which rests with them over the property, to take care that it is duly applied in liquidation of the partnership debts." See also the judgment of the Court delivered by Lord Mansfield, in *Fox v. Hanbury*, C^rwp. 448.

(b) *Barker v. Goodair*, 11 Ves. 78. *Dutton v. Morrison*, 17 Ves. 195.
1 Rose, 213. In re *Wait*, 1 Jac. & W. 605.

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PARTNERSHIP.—JOINT STOCK COMPANY.In the KING'S BENCH.—*Trinity* Term.**TEAGUE v. HUBBARD.**

One partner cannot sue another on account of a partnership transaction. Therefore, where a member of a company drew bills expressly on account of the company, and indorsed them to the actuary, who indorsed them over to another member for a debt due to him from the company, it was held:

that this latter could not sue the drawer on the bills, nor for money had and received, though the drawer had received from the acceptor 10s. in the pound on account of the bills.

ACTION by indorsee against drawer and indorser of two bills of exchange, in the following form :—

“ Two months after date, pay to my order two hundred pounds ; value received.

“ For Cornish Tin Smelting Company,

“ ZECH. HUBBARD.

“ Mr. R. Conness, Long Acre.”

Indorsed, —

“ ZECH. HUBBARD.

“ WM. MEARS, Actuary for Cornish Tin Smelting Company.

“ THOMAS TEAGUE.”

The second bill, which was for 193*l.*, was drawn in like manner, and indorsed, “ Zech. Hubbard, Wm. Mears, Thomas Teague.” Both bills were accepted by *R. Conness*, and dishonoured. At the trial before Lord Tenterden at Guildhall, it appeared that both the plaintiff and defendant were shareholders in the company; that the defendant was an agent for the company, under a *del credere* commission, for the purpose of disposing of their tin; that the plaintiff had sold tin to the company, and had received the bills in question in payment; and that the defendant had received from the acceptor, since the dishonour, 10s. in the pound. The plaintiff was able to prove notice of dishonour on the

other bill only; but Lord *Tenterden* thought that the money received from the acceptor might be considered as money had and received to the use of the plaintiff (the holder for value), and a verdict was accordingly entered for the plaintiff on the special count for his first bill, and on the count for money had and received for half the amount of the second bill, with liberty to the defendant to move to enter a nonsuit, on the ground that the plaintiff could not maintain this action against the defendant, because both were partners in the company. A rule nisi having accordingly been obtained by *F. Pollock*, cause was now shown by

Campbell and *Chitty*. The defendant is liable as *indorser*. He becomes indebted to the company in his character of *del credere* agent, and in payment of that debt indorses bills, payable to *his own order* to the actuary. He acts in this instance not as a member of the company, but as an individual having dealings with the company; and the actuary might have sued him on these bills as the indorser. Again, the plaintiff dealing with the company as a distinct individual, and not as a member, receives these bills from the actuary in payment of a debt due to him from the company; and thus, for a valuable consideration, moving from himself individually to the company, gains the right of action which they had upon the bills against the defendant. The rights and liabilities of persons dealing in their separate capacity are totally distinct from those of the same persons dealing as members of a firm; and here the transactions, as between the plaintiff and defendant, had no reference whatever to their connection with the company as shareholders.

Pollock and *Follett contra*. The question for the Court is, first, Whether in the transaction of drawing

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the bills the defendant was acting for himself individually, or for the company? and then, secondly, Whether one partner can sue another upon his indorsement? Now the bills upon the face of them show that he drew them as agent of and by procuration for the company. Then, the words "to my order," explained by the description of the character in which they are drawn, must mean "to my order as agent for and on behalf of the company," in other words, to the order of the company, *i. e.* of *Hubbard, Meares, and Teague*. The indorsement, therefore, by *Hubbard* is the indorsement of the company, and would be binding upon them, *Lord Galway v. Matthew* (*a*), and *Neale v. Turton*. (*b*) The whole transaction, down to the indorsement by *Meares* inclusive, is a partnership transaction. It matters not in what character the plaintiff received the bills. If it was a partnership transaction he cannot sue the defendant, who is a partner, upon them, *Mainwaring v. Newman* (*c*); else one member of a firm would be suing another for a debt arising out of the partnership, which is contrary to an established principle of law, because, on the taking of accounts, the plaintiff might be found indebted to the company. The action for money had and received stands on the same grounds, and is open to the same objections.

Cur. adv. vult.

The judgment of the Court was subsequently delivered by

Lord TENTERDEN C. J. After stating the facts, his Lordship said, that the rule to enter a nonsuit must be made absolute; that an action could not be maintained against the defendant, as the drawer and indorser of a bill of exchange, acting on behalf of a company of

(*a*) 1 Campb. 403. (*b*) 4 Bingh. 149. (*c*) 2 Bos. & Pul. 120.

which he was a member, by the plaintiff, who was also a member of the same company; nor could the verdict be supported on the money counts, for the 10s. in the pound which the defendant had received from the acceptor, the Court being of opinion that he received that money not as an individual, but as one of the partnership firm, and that, consequently, it must be considered as partnership property; and that if the plaintiff could recover this sum from the defendant, the defendant again would have his action over against the plaintiff for contribution.

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Rule absolute for a nonsuit.

The only right which one partner has against another, in matters relating to the partnership, is a right to an account of the partnership, and the balance due to him, if any, on that account.

RETIRED PARTNER.

In the KING'S BENCH.—*Trinity* Term.

BIGGS and Others, Assignees of COLLIER, v. FELLOWS.

THIS was an action against the defendant as surviving partner of one *George Tatlock*, deceased, to recover the sum of 254*l.*, for money had and received under the following circumstances:—

Messrs. *Whetton, James, and Co.*, haberdashers in the city, being indebted to *Tatlock and Fellows*, in

A partnership debtor is informed of the contemplated dissolution of the firm, and by agreement with the partners gives in further se-

curity for the debt a warrant of attorney to the single partner who was to continue in the business: Held, that payments subsequently made on this warrant to the one partner must be considered as partnership payments; and that having been made after an act of bankruptcy, the retiring partner who had survived was liable to the assignees in an action for money had and received.

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February 1821, for goods supplied in the way of their trade, gave them, in part payment, a bill of exchange at three months for 371*l.* 13*s.*, drawn by themselves, and accepted for their accommodation by one *Collier*. *Whetton* and Co. were unable to take up the bill when due; and *Collier*, when called upon by *Tatlock* and *Fellows* to pay it, was found to be in embarrassed circumstances, and negotiating a composition with his creditors. Shortly afterwards, however, at the solicitation of *Tatlock*, he gave him a warrant of attorney to secure the payment by instalments; and *Tatlock* and *Fellows* having previously made arrangements for the dissolution of their partnership, on an understanding that *Fellows* was to retire, and *Tatlock* take upon himself all the outstanding engagements of the firm, the warrant was, consequently, made out to *Tatlock* alone. *Collier*, accordingly, paid the first two instalments of 50*l.* each, but, failing to pay the next, and being pressed by *Tatlock*, he deposited with him goods as a further security. In the early part of 1822 further payments were made, to the amount of 110*l.*, on the warrant of attorney, by *Collier* to *Tatlock*, which, together with the money arising from the sale of the goods deposited, were applied towards liquidating the balance. In the mean time, in *October 1821*, *Collier* had committed an act of bankruptcy, and his assignees now claimed from *Fellows*, who had withdrawn from the business at the end of the year 1821, the various sums of money which had been so received by his former partner *Tatlock* from the bankrupt *Collier*.

At the trial which took place before Lord *Tenterden* at *Guildhall*, at the sittings before last *Hilary* term, a verdict was found for the plaintiffs; and *Denman C. S.* having obtained a rule *nisi* for a nonsuit, on the ground that the money should be considered as received to the separate use of *Tatlock*,

Sir James Scarlett and R. V. Richards now showed cause. The warrant of attorney was given by the bankrupt to *Tatlock* in August 1821, as a security for a debt due to the firm of *Tatlock and Fellows*. The dissolution of that firm did not take place till the December following. The debt, therefore, was a partnership debt, and the security was given during the continuance of the partnership. The payments subsequently made on that security were consequently made on the partnership account, and form part of the partnership funds. Can the mere circumstance, then, that the warrant was taken in the single name of *Tatlock* vary this? Does it, therefore, cease to be a partnership transaction? Surely the joint debt was not thereby extinguished. The partners themselves thought otherwise; for *Tatlock and Fellows* actually proved under *Collier's* commission as for a joint debt. An arrangement between the partners cannot alter their legal relations with third parties in a partnership dealing, *Bedford v. Deakin*. (a) These payments, then, having been made to the firm after an act of bankruptcy, the defendant as surviving partner of that firm is liable to refund them to the assignees.

Denman and Alderson contra. Whether a retiring partner continues liable after dissolution on account of transactions anterior to the dissolution, is entirely a question of law. Here, the bankrupt was made acquainted with the intended dissolution and consequent separation of interests, whereupon he gives the warrant of attorney to *Tatlock* singly, and thereby enters into, and becomes a party to, the arrangements of the partners. As to him, therefore, the partnership was at an end, and his assignees consequently have no claim as for a partnership liability on account of any subsequent

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(a) 2 B. & A. 210.

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transactions. After dissolution, a partner cannot bind the firm by an indorsement of a bill even for the settlement of partnership accounts, *Kilgore v. Finlyson*. (a) Nor can a person, having due notice of the dissolution, who subsequently treats with one of the partners individually, come upon the firm. Now here there was what was equivalent to a dissolution with respect to the bankrupt, an apportionment of interests, with which he was made acquainted. And after this, *Fellows* could not be liable for money received from the bankrupt by *Tatlock*. [*Bayley* J. It is true *Tatlock's* was the hand which received the money; but unless there is evidence to the contrary, it must be presumed to have been received on the partnership account, that to which the original debt of *Whetton* and Co. referred. Besides, it appeared that even after the dissolution, *Fellows* did interfere in one instance, for that he proved for a dividend upon *Collier's* estate. Lord *Tenterden*. The partnership as to by-gone transactions continues.] This must be considered as the *individual* transaction of *Tatlock*: the goods were deposited with him alone; he alone indemnifies the sheriff; and alone gives directions as to the sale.

Lord TENTERDEN C.J. There is no reason to disturb this verdict: the sum of 371*l.* is due on a bill accepted by *Collier* in favour of *Tatlock* and *Fellows*: he is informed that they contemplate a dissolution, and he gives a warrant of attorney as a further security to *Tatlock* separately. But *Tatlock* and *Fellows* might have sued jointly on this warrant: whatever was paid on it would be paid to both: it is in law a payment to the partners, and being after an act of bankruptcy, both were liable to account for it to the assignees.

BAYLEY J. The warrant of attorney was given *prima facie* to *Tatlock and Fellows*; and it lay with the defendant to show that there existed some particular bargain between the parties by which the money paid on it to *Tatlock* was not a payment to both.

Rule discharged.

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Private arrangements between the partners, such as that mentioned in this case, whereby those who continue, engage to take upon themselves all the liabilities of the firm, are altogether inoperative as respects the existing creditors. They have still a right to look for payment to every individual who was part of the firm at the time when their debt was contracted. Even their acquiescence in the arrangement does not bind them, because unless some higher and better security than that which they have, such, for instance, as a bond or warrant of attorney to confess judgment, is given them by the new firm, there would be no consideration to them for the abandonment of their claim upon the retiring partner. (a) Conversely, also, an agreement by the retiring partner, that those who remain should take all debts due to the firm, on condition of their satisfying all debts due from the firm, would not be binding either on him or his representatives, or his assignees in case of bankruptcy. Outstanding debts owing to the old firm are assets for the payment of their debts. Payment, therefore, to the continuing partners would be a payment to the old partnership; and if unduly made, all the members of that old partnership would be liable to account for it.

(a) See *David v. Ellice*, 5 B. & C. 196. *Fox v. Hanbury*, Cowp. 445.

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LIABILITY OF BANKERS TO THEIR CUSTOMERS.—MISCONDUCT OF PARTNER.*GUILDRALL, October 25.—Before Lord TENTERDEN Ch. J.***LONGMAN and Others v. Sir PETER POLE, Baronet,
and Others.**

If a partner of one firm collude with a partner of another, in a matter within the regular course of dealing between the two firms, whereby the other partners in the latter firm sustain an injury, the innocent partners of the person so colluding are liable for damages to the injured firm.

THE first count of the declaration stated that the plaintiffs and one *Thomas Hurst* carried on business under the firm of *Longman and Co.*, and that the defendants, being the bankers for the said firm, kept, and from time to time exhibited to the partners of the said firm, divers books of accounts purporting to contain just and true statements and entries of all payments made by the defendants, as such bankers, for or on account or in the name of the said firm; and that the said *T. Hurst*, without the consent or knowledge of the plaintiffs, and for private purposes unconnected with the concerns of the said firm, had fraudulently and wrongfully drawn in the name of the said firm four promissory notes for the payment of the respective sums of 2500*l.*, 2500*l.*, 1600*l.*, and 1000*l.*, and accepted four bills of exchange for the same sums respectively, in the name of the said firm; which notes and bills were directed to the said defendants, and paid by them, when they became due, out of monies supplied by the said *T. Hurst*; and that the said defendants, well knowing the premises, wrongfully conspired with the said *T. Hurst* to deceive and injure the said plaintiffs, and to keep them ignorant of the making, drawing, and accepting of the said promissory notes and bills of exchange by the said *T. Hurst*, and thereby to enable the said *T. Hurst* to deceive and

defraud the said plaintiffs; and that the said defendants, in pursuance of such combination and conspiracy, wrongfully and injuriously suppressed and omitted in a certain account-book called a pass-book, which purported to contain a just and true entry of all payments made by the said defendants as such bankers, on account or in the name of the said firm, the entry, statement, and account of the said bills and notes, and of the payment thereof, contrary to the ordinary and proper course of business of the said defendants as such bankers; and that the said defendants exhibited the said pass-book to the said plaintiffs without any such entry, statement, or account as aforesaid, as and for a just and true book containing entries of all payments made by the defendants as such bankers on account or in the name of the said firm; by means whereof the said plaintiffs were kept in ignorance of the fraudulent use of their name by the said *T. Hurst* in the drawing, &c. of the said bills and notes, and afterwards were induced to permit the said *T. Hurst* to withdraw out of the said plaintiffs' hands the several sums of 10,000*l.* and 37,000*l.*, as and for the amount of his share of the capital invested in the said firm; which said several sums of money they would otherwise have retained in their hands as an indemnity to themselves against liabilities incurred by the said *T. Hurst*; and that afterwards the said *T. Hurst* became insolvent and a bankrupt, and that after the said insolvency and bankruptcy of the said *T. Hurst*, the said plaintiffs were compelled to take up and pay divers promissory notes and bills of exchange to the amount of 20,000*l.*, which had been fraudulently made, drawn, indorsed, and accepted by the said *T. Hurst*, in the name of the said firm of the plaintiffs and *T. Hurst*, during the partnership of the said plaintiffs and *T. Hurst*, without the knowledge or consent of the said plaintiffs.

The second set of counts alleged a duty in the de-

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fendants, as such bankers, to keep and from time to time to exhibit to the partners of the said firm certain books of account containing just and true entries and statements of all payments, &c.; but that they had omitted, and suppressed certain entries in the pass-book, whereby, &c.

The third set of counts averred that it was the duty of the defendants to keep and exhibit to the partners of the plaintiffs' firm a pass-book, in which all cash and bill transactions in the name of the said firm passing through the banking-house of the defendants should be duly and correctly stated, and alleged a breach of this duty.

The last counts set forth that it was the duty of the defendants not to pay any bills or notes wrongfully or fraudulently made, drawn, or accepted, and known by the defendants so to be, by any one of the partners of the said firm in the name of the said firm, without the knowledge or consent of the other partners of the said firm, and alleged a breach.

The plaintiffs in this case were the well known publishers, *Longman and Co.*, of which firm *Thomas Hurst* was formerly a member, and the defendants were *Pole, Thornton, and Co.*, bankers, of whose house *Downes*, one of the defendants afterwards particularly alluded to, was a partner. From the evidence of the plaintiffs' cashier it appeared that the plaintiffs banked with the defendants, and were in the habit of making their acceptances payable at the defendants' house. On the 14th October 1825, the cashier was sent by *Hurst* to the defendants with cash to take up three bills amounting in all to 5500*l.*, accepted by him in the name of the firm, and coming due the next day. He took up the bills, and by *Hurst's* order did not enter them in the plaintiffs' books. The usual banker's pass-book was kept by the defendants, and a check-book by the plaintiffs, neither of which, when produced, contained any

entry of these bills. The plaintiffs were not in the habit of examining the pass-book, but their own check-book only; which latter was kept by their clerk, and purported to be a transcript from the pass-book. On cross-examination, however, the cashier admitted that there were bills on *Hurst's* private account amounting to 38,000*l.* which appeared in the pass-book and not in the check-book. *Booth*, a clerk of the defendants, proved that about the period above mentioned Mr. *Downes*, one of the defendants, told him that a bill of *Longman's* for 2500*l.* would come in on such a day, which he was to pay, and give to him (*Downes*), debiting *Hurst* with it in the note-book (a), so that it might not go into the ledger. That in a fortnight afterwards *Downes* gave him similar directions respecting another bill of the same amount. Both these bills, which were acceptances by *Hurst* in the name of the firm, were paid and entered in the note-book to the debit of *Hurst* individually, instead of being entered in the ledger in the usual way in which acceptances of the firm were entered; by which means no trace of them appeared in the pass-book. The cash payments made by *Hurst* to provide for these bills were also entered in the note-book to the credit of *Hurst*. It further appeared, that at the time of these transactions *Hurst* had a private discount account with the defendants to the amount of 60,000*l.* at one time. On cross-examination, this witness stated that Mr. *Green*, one of the plaintiffs, on the discovery of the state of their account, told him that the defendants had paid 38,000*l.* in the name of the plaintiffs' firm, which they had nothing to do with; and when the witness asked him how it was that they did not find it out, as these

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(a) The defendants kept a note-book and a note-ledger, in which were entered those transactions of their customers, which, being of a private nature, were meant to be kept distinct from the general accounts of the parties.

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sums were entered in the pass-book, he said, “*We did not look at the items: only at the balance.*” The plaintiffs then proved that *Hurst* retired from their firm in January 1826, and was paid the capital he had in it, to the amount of 47,000*l.*, and that subsequently they were compelled to pay his acceptances in the name of the firm to the amount of 19,340*l.*, which were all running at the time of his retirement.

Lord TENTERDEN to the jury. If one partner of a firm colludes with one of another firm in a transaction connected with the partnerships, the partners of the person so colluding are liable for any injury arising to that firm by reason of their partner’s misconduct, and, therefore, there is no objection in point of law to this action. The question upon this record is, first, Whether *Downes* had a design of assisting *Hurst*, by withholding from his partners a knowledge of the transactions in which he was engaged? Upon the evidence of the defendants’ clerk, it must be considered an *irregular* transaction; but if it were not done with the unlawful intention of enabling *Hurst* to deceive his partners, the defendants are not liable for any loss which the plaintiffs may have sustained in consequence. It is material as to this point to observe, that *Hurst* was at this time in good credit; which makes it the more difficult to say what motive *Downes* or his partners could have for such a design. The second question is, Whether the plaintiffs have in fact sustained any injury from the omission by the defendants to enter the bills in the pass-book? Now the defendants never examined the pass-book: but then it is said, that if these bill transactions had been entered in the pass-book they would have found their way into the check-book of the plaintiffs, and so would have come to their knowledge. It should be recollect ed, however, that there are items in the pass-book to the

amount of 30,000*l.*, which are not found in the check-book; and even had it been so, it is by no means certain that they would have observed the entry in the check-book. Now, unless it can be inferred that if the entries had been in the pass-book they would have discovered them, they have sustained no injury by the omission, and, consequently, cannot recover against the defendants for that omission.

Verdict for the defendants.

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The principle of this case is very important; because, if it had been satisfactorily established (as it certainly was not) that Mr. *Downes* was aware that *Hurst* was unwarrantably using the credit of one firm, and throwing upon it a liability, in order to uphold the sinking credit of another firm, altogether unconnected with the former, of which he was also a member, and with such knowledge, had aided him in this fraudulent practice, not only, it seems, would he have been liable *individually* to the injured partners, for any consequences which might result from the collusive dealing, but his own innocent partners also would have been involved by his misconduct in the same liability. In short, it must be understood that partners are guarantees for the acts of each other in all transactions immediately connected with the purposes of the partnership.

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BILL OF EXCHANGE.—RESTRICTED INDORSEMENT.

In the KING'S BENCH.—*Michaelmas Term.*

SIGOURNEY v. LOYD and Others.

A foreign bill is indorsed, "Pay S. W. or order, for my use," and is discounted by the indorsee at his bankers.

They apply the proceeds in the usual course of dealing to the account of the indorsee, who immediately afterwards becomes bankrupt, without accounting for the bill to the indorser: Held, that the bankers were liable to the indorser for the amount of the bill, in an action for money had and received.

THIS was an action brought by the plaintiff, a merchant residing at *Boston*, in the *United States*, against the defendants, who are bankers in *London*, carrying on business under the firm of Messrs. *Jones, Loyd, and Co.*, for money had and received by the defendants to the use of the plaintiff.

At the trial before Lord *Tenterden*, at Guildhall, a verdict was taken, by consent, for the plaintiff for £164*l. 11s. 8d.*, subject to the opinion of the Court on a case, the material parts of which, as affecting the present question, were as follow:—

In July 1825, Captain *Atwood*, who commanded a vessel belonging to the plaintiff, took in payment of a cargo of flour, the property of the plaintiff, which he had sold at *Rio Janeiro*, a bill of exchange, at sixty days' sight, for £164*l. 11s. 8d.*, drawn, in a set of three, by *March, Sealy, Walker, and Co.*, of that place, on *March, Sealy, and Co. of London*. This bill was made payable to the order of Messrs. *Hendricks, Wierss, and Co.*, who indorsed it to Captain *Atwood*. *Atwood* sent the first of the set, but without indorsing it, to the correspondent of the plaintiff, Mr. *Samuel Williams* of *London*, who was an *American* agent and factor for merchants and planters, carrying on business to a very great extent. The letter which accompanied it informed Mr. *Williams* that it was the proceeds of a cargo of

flour belonging to Mr. *Sigourney*, and desired him to present it for acceptance, and keep it at the disposal of the second or third. Mr. *Williams* received this letter and bill on the 26th *September* 1825, and on the same day procured the acceptance in due course. On the 21st of *October* Mr. *Williams* received from the plaintiff the third bill of the set, indorsed by *Atwood* to the plaintiff, and by him to Mr. *Williams*, in the following words: “*Pay to Samuel Williams, Esq. of London, or his order, for my use. Henry Sigourney.*” It was inclosed in a letter, of which the following are extracts: “Your account current was found correct as usual.”—“The *Hope* sailed again for *Gottenburgh* on the 1st, and if she arrives safe, there will be a considerable excess from the outward cargo, which will eventually go into your hands.” (a) It then proceeds to state, that Captain *Atwood* had arrived from *Rio Janeiro*, and had informed the plaintiff of the remittance of the first bill of the set, and of his omission to indorse it, so that if received it could only be accepted, and concludes thus: “Enclosed you have third bill of the set, indorsed to me by Captain *Atwood*, and to yourself by me. I presume that if the other should have been previously received and accepted, a receipt on the one now transmitted would be accepted at maturity. Have the goodness when you advise the receipt, which I trust will be as soon as possible, to inform me the standing of the acceptors.”

On the following day (the 22d *October*) the bill was discounted. The defendants were the bankers of *Williams*, and in the habit of discounting largely for him. In the morning of that day the balance in his favour was 3784*l.* 10*s.* 10*d.* About eleven o'clock he indorsed

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(a) These extracts are given in order to show that there was no want of confidence in *Williams* on the part of Mr. *Sigourney*.

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the bill in question, with others, amounting in the whole to 7081*l.* 17*s.* 9*d.* to the defendants, who discounted them for him *bona fide*, giving him credit for the amount, less the discount, and subsequently at the clearing house, about five o'clock in the evening of that day, paying his acceptances to the number of thirty-two, and three drafts, amounting altogether to 10,683*l.* 18*s.* 1*d.* The defendants had no notice of the letters which had accompanied the bills to Mr. *Williams*. On the 24th October *Williams* stopped payment: a commission issued against him dated the 27th, and he was immediately afterwards declared bankrupt. The bill in question was honoured at maturity, and the amount received by the defendants.

The question, therefore, for the opinion of the Court was, Whether, under these circumstances, the plaintiff was entitled to recover the amount of this bill? and it depended upon this, whether the indorsement to *Williams* was a restrictive indorsement or not.

F. Pollock for the plaintiff. There may be a restrictive indorsement on a bill of exchange; that is, an indorsement which will prevent the interest from passing beyond a particular individual, except for a particular purpose, or subject to a certain condition, so as to prevent the general rule, which would otherwise apply to all bills of exchange, from being extended to that particular case. The earliest case in which this point is noticed is that of *Snee v. Tollett* (*a*), before Lord Chancellor *Hardwicke*. It is, indeed, rather an incidental observation than a judicial decision: but it shows a very early opinion on the subject, which was introduced under circumstances entitling it to considerable weight. A question there arose as to the effect of a bill of lading

(*a*) 1 *Atkyns*, 249.

being indorsed specially or in blank, and Lord *Hardwicke*, in illustration of his opinion, uses these words : " Promissory notes and bills of exchange are frequently indorsed in this manner : ' Pray pay the money to my use,' in order to prevent their being filled up with such an indorsement as passes the interest. Mr. *Lutwych*, who was an experienced practiser in this Court, always did so in his bills of exchange." So far, therefore, as this is an authority at all on the subject, it seems that a bill of exchange may have a sort of mark put on it, designating that it is the property of a particular individual, and that the general negotiation of it is to be restrained. A similar point was determined a few years afterwards in the case of *Edie v. The East India Company.* (a) The principal question decided in that case was, that when once a bill of exchange, which is made payable to the order of a particular individual, has been by him indorsed over to some other, the bill becomes payable to that other without the addition of the words "or order," a point on which from that time to the present there has existed no doubt. But in giving judgment, Mr. Justice *Wilmot* (speaking of the holder of a bill) says, " To be sure he may give a mere naked authority to a person to receive it for him: he may write upon it, ' Pray pay the money to my servant for my use,' or use such expressions as necessarily import that he does not mean to indorse it over, but is only authorizing a particular person to receive it for him for his own use. In such case it would be clear that no valuable consideration had been paid him. But at least that intention must appear upon the face of the indorsement." [He was now stopped by the Court, Lord *Tenterden* remarking that these authorities were very much to the point.]

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(a) 2 Burr. 1227.

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Parke for the defendants. The position laid down on the other side, that there may be a restricted or qualified indorsement, cannot be disputed. The question here is upon the construction and effect of the particular indorsement in question. Now this is merely a direction by the plaintiff, that *Williams*, when he received and negotiated that bill, should place the proceeds to his account. It does not restrain or in any way affect the negotiability of the instrument. There is no dispute that it was discounted *bonâ fide* at the bankers. [*Bayley* J. That is *bonâ fide* by the banker. *Lord Tenterden*. And *malâ fide* by *Williams*.] Can the banker then hold that security for which he has given the full amount? Every indorsement *prima facie* transfers the right to the indorsee. The omission of the words "or order" does not restrict it, *More v. Manning* (a), *Atcheson v. Fountain*. (b) In *Edie v. The East India Company*, cited on the other side, some of the learned Judges expressed a doubt whether there could be a restrictive indorsement; and Mr. Justice *Denison* said, "In general the law says it is assignable. And it is not material when or how filled up: for it is every day's practice to fill up the indorsement long after it is made; nay, even in Court, at the trial. I will not give any opinion whether the indorser might have limited his assignment by some clear, plain, negative words, if in fact it had been his intention to limit and restrain it." Now are there here any clear, plain, negative words limiting the negotiability? It is undoubtedly transferable, for the words "or order" are inserted. It is, Pay to *Williams or order*, for the use of *Sigourney*. It is clear, therefore, that the *legal* title to the bill was in *Williams*, though he held it for the use of *Sigourney*. In

(a) Comyn's Rep. 311.

(b) 1 Strange, 557.

Cramlington v. Evans (a), the meaning of the term "for my use" was much discussed. In that case the defendant drew a bill of exchange payable to one *Price* to the use of *Calvert*. *Price* assigned it by indorsement to the plaintiff, who brought the action as indorsee. The defendant pleaded that *Calvert* was indebted to the king, and that thereupon an extent had been issued, and this money paid, to which plea the plaintiff demurred. After argument, *Holt Ch. J.* said, "This is a bill which is assignable by *Price*, and when *Price* assigned it he received the money, and that receipt was for the use of *Calvert*, and *there Calvert hath his action: but we can take notice of none but Price*, and at this rate the credit of bills of exchange will be spoiled." (b) This case is a strong authority in favour of the defendants. The Court considered *Price* to be the person who had the legal property in him, and so decided. It is clear, therefore, that *Williams*, having by the very terms of the indorsement a power to transfer the bill, had a power also to transfer the legal right in it, and then the question is as to the meaning of the additional term "to my use." Now there are two constructions which may be put upon it; but the reasonable construction is, that this is a mere direction as between *Sigourney* and *Williams*, that the latter, as his agent, is to apply the proceeds to his use, and that the words introduced are equivalent to "which place to my account," or, "which apply to my use;" or that they were inserted for the purpose of

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(a) This case, as was stated in the argument, is found in four different reports. It is here cited from 1 Show. 4. where it appears as a case in error. The pleadings are set out at length in 2 Vent. 296. See also Carth. 5. and Skin. 264.

(b) The report of the same case in Carth. was also given at full length in the argument. The principal point there stated to have been decided is, that *Calvert* had a mere equitable right to the proceeds of the bill, which was, therefore, not liable, as it was then considered, to an extent.

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showing that the bill was remitted on account of *Sigourney* himself, and not of some correspondent, whose agent he might be for the remittance; that they were, in short, a designation of the particular account to which they were to be applied. [*Bayley* J. And the defendants apply it to a different use.] What would be the effect of that? It is clear that if the words "which apply to my account or use" had been inserted, it would have been a direction to *Williams* that when he had *bond fide* indorsed the bill and obtained value for it, he was to apply the proceeds in a particular manner. It would have been a matter entirely between him and the plaintiff, and the person who took the bill would not be accountable. [*Bayley* J. The money remained in the bankers' hands, and they applied it: they were parties, therefore, to the mal-application.] That is the question; Can you put on them the character of a new trustee? [*Bayley* J. The money is put into their hands, *and they have notice of the trust*; *Williams* had no authority to receive this money except to the use of *Sigourney*, and the bankers, knowing that it is clothed with this trust, apply it to the use of *Williams*.] If the money be paid to *Williams* under circumstances not calculated to excite suspicion that a misapplication is intended, then the holder is entitled to receive, and a subsequent indorsee is exonerated. It is clear that it was meant to be negotiated; and a person to whom a bill is offered under such circumstances, is not bound to enquire whether it is necessary or to the benefit of the indorser that the bill should be discounted. The bill is to be transferred, and he finds on reading it, that it is to be transferred to somebody else for the use of *Sigourney*. Now the argument on the other side must go the length of contending that every subsequent indorsee becomes a trustee for *Sigourney*. A consequence highly inconvenient. This being a question of intention, can it be supposed that *Sigourney*, in *America*, could

intend to impose the duty of becoming his agent on each successive indorsee, on one with whom he has no communication, no means of intercourse, no power to direct the application of the money? [*Bayley J.* Is it necessary to go that length? May we not stop with the first indorsee? Whether the subsequent indorsee might or might not be entitled to apply the money to his own use, is a question which does not arise here. (a)] The argument applies with equal force to the very first indorsee. It is an unreasonable construction to suppose that *Sigourney* should intend (and there being no precise authority on the point, unless *Cramlington v. Evans* be so considered, we must have recourse to the intention,) to constitute a mere stranger his agent, and to clothe him with a trust for his benefit. Whereas it is a reasonable construction to suppose that he intended to enable *Williams*, with whom he had a relation of principal and agent, to receive the money with a direction, frequent in bills of exchange, to apply it, when received, to his account. According to the dictum of Lord *Holt* in *Cramlington v. Evans*, *Williams* as soon as he had received the money became responsible for it in equity to *Sigourney*. If then *Loyd* and Co. become responsible to him also, and hold the bill until it is due as his trustees, then a person may by an indorsement like the present constitute two sets of trustees; a consequence which seems somewhat absurd. It may be admitted, that if it appeared from the circumstances accompanying the discount that the money would not be applied to the use of *Sigourney*, then the transaction might be void on the ground of fraud. The case of *Treuttel v. Barandon* (b) proceeded on that principle.

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(a). See *Collins v. Martin*, 1 Bos. & Pul. 648. *Bolton v. Puller*, 1 Bos. & Pul. 546. *Ex parte Pease and Another*, 1 Rose, 238. *Treuttel v. Barandon*, post.

(b) 8 *Taunt.* 100.

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[*Bayley* J. The principle there decided, whether rightly or not, is that an indorsement to pay *A.* or order for the account of *B.*, will not prevent *A.* from indorsing for value under circumstances inducing a belief that the value is to be applied to the use of *B.* Now here the party who indorses it applies the money not to the use of *Sigourney*, but to his own use, and the defendants knew of and were parties to the misapplication.] The whole of the money was disposed of in the general course of dealing with *Williams*. How was it possible for the bankers to know how he would apply it? He might have had transactions in the course of which he had accepted bills for *Sigourney*, and made them payable at *Jones, Loyd, and Co.'s*. In paying his acceptances, therefore, with the proceeds of the bill, they had no reason to suppose that they were diverting the money from the use of *Sigourney*. Again, he might have dealings on account of *Sigourney*, which made it necessary to pay in checks; and applying the money, therefore, in discharge of these bills and checks, would be no more than putting it into the hands of *Williams* himself, without any circumstance indicating an intention on his part of misapplying it. Would it not be extremely inconvenient in mercantile transactions to impose upon the banker the duty of looking into another's concerns? What right have Messrs. *Loyd* to say to *Williams*, "Before we discount your bill, you must show us the state of your account with Mr. *Sigourney*; we must be satisfied that you are under such circumstances as to justify the indorsement of the bill?", Is it not quite enough to show that value has been given for it, under no circumstances calculated to excite suspicion? The effect of the whole, then, is, that this was a payment to *Williams* himself, who thereupon became responsible to his employer. *Williams* is the trustee, not *Jones, Loyd, and Co.*, who receive the bills,

not on account of *Sigourney*, with whom they have no connection, but on their own account. There cannot be two trustees; and it comes at last to the question, What was the meaning of the party who made that indorsement? Now the most convenient construction, and one unattended with any evil consequence, is, to say that it is equivalent to an indorsement in this form: "Pay *Williams*, or order, to be placed to my account."

Lord TENTERDEN C. J. I am of opinion that the plaintiff in this case is entitled to recover. It appears by the case of *Snee v. Prescott*, where Lord *Hardwicke's* opinion is reported, and by the opinion of Mr. Justice *Wilmot*, in *Edie v. The East India Company*, that an indorsement in this form is not unusual in commercial transactions. And it seems to have been the opinion of the learned persons whose names I have mentioned, that such an indorsement would have the effect of preventing a subsequent transfer for any other benefit than that of the person who has made the indorsement, and for whose use it was in terms expressed to be. There is another case which has not been quoted; that of *Ancher and Others v. The Governor and Company of the Bank of England*(a), of which the effect is the same, though the indorsement was somewhat different in form. The indorsement there was this: "The within must be credited to Captain *Morten Larsen Dahl*, value on account." Some person forged the name of *Dahl* on the back of the bill, and the Bank of *England* discounted it. The acceptors having failed did not pay it when it became due, and a person of the name of *Fulberg* paid it for the honour of *Ancher*. *Ancher* brought his action against the bank to recover that money, on the ground that they had discounted it

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(a) Doug. 639.

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in their own wrong, the negotiability having been restrained by the indorsement. The case being brought before the Court upon a motion for a new trial (for the plaintiff at the trial was nonsuited), the opinion of Lord *Mansfield*, Mr. Justice *Willes*, and Mr. Justice *Ashurst*, was to that effect; but it appears Mr. Justice *Buller* thought otherwise. The case, however, went to a new trial, and Lord *Mansfield* directed the jury to find for the plaintiff, which they accordingly did. Now it has been said that the effect of this indorsement on the bill, "Pay to *Williams* for my use," is only a direction as to the manner in which he should apply it. But these words are useless for that purpose; for whether these words were on the face of the indorsement or not when *Williams* received that bill from the plaintiff *Sigourney*, he must necessarily apply it to his use, and place it as a matter of account between them. So that these words will really have no effect at all, unless they have the effect of restraining the negotiability of the bill, or at least, of making the first person who subsequently takes the bill, (we need not go beyond that, for the defendants were the first indorsees,) if he takes it with those words in it, a trustee for the original indorser, in like manner as *Williams* is admitted to have taken it. The case that has been quoted as being contrary to these opinions is the case of *Evans v. Cramlington*, which is of a prior date, but duly considered it does not appear to me to be sufficient to countervail the opinions given in *Ancher v. The Bank of England*. In *Evans v. Cramlington* the bill was drawn by *Cramlington* upon a person who had accepted, but did not afterwards pay it; it was made payable to *Price*, or order, for the use of *Calvert*. *Price* indorsed it to *Evans*. *Evans* brought his action against the drawer upon the failure of the acceptor. A seizure under an extent was made. These facts appeared upon the pleadings. It seems that *Cram-*

lington, in answer to the claim of *Evans*, the indorser of the bill, set up what may be sometimes denominated the *jus tertii*; and one of the questions for the opinion of the Court, and the one ultimately decided, was, Whether or no this money, being in trust for the use of *Calvert*, was liable to be seized under the extent? The Court were of opinion it was not liable to be seized, and the proposition, therefore, of *Cramlington*, that the *jus tertii* intervened, failed, and was altogether nugatory. I doubt whether since that time it would not have been held that the right of the crown under an extent was a good and valid right. I rather conceive that trusts of money, as well as of land, are seizable under an extent. That case, therefore, as it seems to me, not being a sufficient authority to countervail the opinions I have alluded to in the decision of the Court in *Ancher v. The Bank of England*, I think that the plaintiff is entitled to recover. The use of indorsements of this kind is by no means trifling; nor is it inconsistent, as it seems to me, with the interests of commerce. It is true it will not have the effect of preventing an indorsee, under circumstances like the present, from receiving the money from the acceptor when the bill becomes due; and if he pays it in at the time he receives it, all is well; at all events, the first indorser must look to him for the application of it. But it will have the effect of preventing a falling man from disposing of the bill before it becomes due, from pledging it for his own debt to rescue him from a temporary difficulty at the expense of one of his correspondents. I cannot see that the interests of commerce are by any means prejudiced by holding out that this may be done by means of a restricted indorsement. On the contrary, I think the objects of commerce are advanced by allowing it. It is said that it cannot be expected that a person who takes a bill under the circumstances under which these bankers took it should

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look into the accounts between the restricted indorsee and the indorser. I agree it cannot be expected he should; but if he takes the bill under the circumstances so indorsed, he takes it at his peril. If the indorsee has made a due application of the money, or if the circumstances, and the state of the account as between him and the indorser, are such as that the indorser has no claim to the money, all is well; but a person who takes it from an indorsee, subject to the claim of another, is not safe, nor ought he to be. If he takes a bill with a restricted indorsement as this is, I think he takes it at his peril; and if it turn out afterwards that the person from whom he received it, that is, the restricted indorsee, is debtor to the indorser, he must stand in the place of that debtor, and pay that debt.

BAYLEY J. The indorsement here is, "Pay to *Williams* or order, for my use;" and the question is, Whether the words, "for my use," have or have not any effect with reference to the bill itself? The person who remits may give private directions in his letter inclosing the bill to his agent, and if he means to give nothing more than a private direction, he must confine himself to the letter only. But the introduction of the words, "to my use," upon the face of the bill itself is for the purpose of apprising the world in general that he has not given to the indorsee a general and unlimited authority to possess that bill, and to apply it to his own purposes, but that he is restricted to apply it to the use of the indorser only. Mr. Parke suggests, that the most convenient construction to be put on these words is to consider them as directing *Williams* only, and not as intended to put indorsees on their guard. My opinion is, that that is the most convenient rule of construction which will most effectually protect the party who appears by the mode which he has adopted to ask for protection.

It is said, Why introduce the words "or order?" It may be that the purposes of *Sigourney* require that the bill should be indorsed. But before any person can honestly and *bond fide* take that bill and advance money upon it, he ought, seeing those words on the face of the bill, to satisfy himself from the correspondence, and the state of the accounts between the parties, whether the holder is negotiating it for the benefit of the indorser or for his own use; and if he advance the money upon it without making that enquiry he does it at his peril. But in this instance the present defendants advance the money without making any enquiry, and then they apply the whole of it to the use of *Williams*. With respect to the case of *Evans v. Cramlington*, it is sufficient to say, that as that came before the Court on demurrer there was no question there, whether there had been a misapplication of the money which had been received by the means of that bill. Is not this quite a sufficient distinction between that case and the present? In this case there does appear to me to be a gross misapplication. For these reasons I am of opinion that the plaintiff, who guarded himself by that indorsement, gave himself effectual protection, and is entitled to the verdict which has been given for him in this case.

Postea to the plaintiff. (a)

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(a) Littledale J. was absent in the Bail Court.

The effect of this decision will certainly be to prevent the negotiating of bills restricted in their terms like the present. It is apprehended, however, that the instances of such restrictions are very few, and that no sensible impediment to the circulation of mercantile securities will be likely to arise from it. The case has seldom, if ever before, come regularly before the courts; but on principle it seems reasonable, that the holder of such an instrument should have the power

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of limiting the use of it. The correspondent to whom he remits it may be in his debt to an amount which he thinks it prudent not to exceed. Although, therefore, for convenience he empowers him to receive the amount from the acceptor when due, and for that purpose makes it payable *to his order*, yet it may be desirable to prevent him from availing himself beneficially of it before that time; for in the meanwhile he has the opportunity of making such arrangements as may reduce the balance in his correspondent's hands. Where an indorser, therefore, deviates from the usual mode of transfer, and gives a particular direction, like that upon the bill in question, it may reasonably be presumed that he has this intention. It is objected, that it is unreasonable to expect from a banker, discounting a bill for his customer, that he should take upon himself the responsibility of seeing that the proceeds are applied to the purposes required. But the answer is very plain. He is not compelled to discount it at all; and, in refusing to do so, he will probably best fulfil the intention of the indorser. He cannot be taken by surprise, because the limitation must appear on the face of the instrument, else it can have no effect in restraining the negotiability. With respect to the particular case before the Court, there certainly were no circumstances tending to show a want of confidence on the part of Mr. Sigourney as to the credit and solvency of his correspondent; on the contrary, his letters express satisfaction at the state of his account. But if, as seems to be the fact, qualified indorsements of this kind have been held in the *American* courts of law to restrict the negotiability, then Mr. Sigourney may be presumed to have acted with this intention. And at all events it was necessary for the Court to be uniform in its construction, and to lay down a general rule, without regard to particular circumstances. In this case there is one peculiarity, which was much insisted upon by the Court during the discussion, but does not seem to have been an ingredient in the judgment, viz. that the bankers were privy to the misapplication. It may be useful, therefore, to remark, that the decision must be considered as independent of this fact, and as having imposed upon the person discounting for the *immediate indorsee* the duty of taking care that the proceeds shall be applied to the purpose prescribed by the indorsement.

**BILL OF EXCHANGE.—STOCK-JOBMING
ACT.**

1828.

In the KING'S BENCH.—*Trinity* Term.

GREENLAND and Another v. DYER.

THIS was an action by the indorsee against the acceptor of two bills of exchange, one for 100*l.*, the other for 65*l.* The cause was tried before Lord Tenterden, at *Guildhall*, at the sittings before *Trinity* term, when it appeared on cross-examination of the drawer, who was called by the plaintiff, and who was a stock-broker, that there had been some stock-jobbing transactions between the defendant and himself, and that the bills in question were given in payment of differences on time-bargains; but with this fact the plaintiff was altogether unacquainted. A verdict was then taken by consent for the plaintiffs, subject to the opinion of the Court as to the effect of the illegal consideration given for the bills. Accordingly, in this term,

In an action by an innocent indorsee of a bill of exchange against the acceptor, it is no defence that the bill was given to settle stock-jobbing differences.

Chitty applied for leave to set aside the verdict, and enter a nonsuit, on the ground that the consideration being illegal by the 7 G. 2. c. 8., which declares all contracts and agreements in the nature of wagers relating to the price of the public stocks to be null and void to all intents and purposes whatsoever, the bills were so tainted that they could not be made available even in the hands of an innocent indorsee. In the hands of the drawer, he argued, they would be undoubtedly void, because to enable him to recover upon them against the acceptor would be to give effect to a contract which it was the express intention of the act to annul; and the

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object would be equally frustrated if he could indorse over such bills, himself receiving the full value, and thereby empower his indorsee to sue upon them. It would be in effect to do through the medium of another what he was forbidden to do himself. In the cases which had been determined under the 9 Anne, c. 14., called the Ganning Act, and the 12 Anne, c. 16., called the Usury Act, it had been expressly holden that even an innocent indorsee for valuable consideration could not recover against the original party, where by so doing it would have the effect of substantiating the illegal contract. *Bowyer v. Bampton* (a), *Lowe and Others v. Waller.* (b) But the Court refused the rule,

Lord TENTERDEN saying, If only the *contract* is declared void by an act of parliament, it leaves the *securities* valid in the hands of an innocent party. The distinction between the gaming and usury acts and the present, the 7 G. 2. c. 8., is well known. The contract mentioned in that act, and which is declared void, is a contract in the nature of a wager to give stock at a future day; the contract in this bill of exchange is to pay to the drawer, or his order, a sum of money. The 7 G. 2. declared the *contracts* mentioned in that act void, but not the *securities*.

(a) 2 Str. 1159.

(b) Doug. 736. But by 58 G. 3. c. 93. no bill of exchange or promissory note, though it may have been given for a usurious consideration or upon a usurious contract, shall be void in the hands of an indorsee for valuable consideration, unless such indorsee had, at the time of discounting or paying such consideration for the same, actual notice that such bill or note had been originally tainted with usury.

The first section of this act, which owes its origin to Sir John Barnard, and is entitled "An act to prevent the infamous practice of stock-jobbing" (in which it has been

just as effectual as acts of parliament which endeavour to counteract strong propensities generally are), declares, "that all *contracts* and *agreements* whatsoever, which shall be made or entered into by or between any person or persons whatsoever, upon which any premium, or consideration in the nature of a premium, shall be given or paid for liberty to put upon, or to deliver, receive, accept, or refuse any public or joint stock, or other public securities whatsoever, or any part, share, or interest therein, and also all *wages*, or *contracts in the nature of wages*, and all contracts in the nature of puts and refusals, relating to the then present or future price or value of any such stock or securities as aforesaid, shall be *null and void to all intents and purposes whatsoever*;" and the fifth section enacts, "that no money or other consideration shall be voluntarily given, paid, had, or received, for the compounding, satisfying, or making up any difference for not transferring public stock, or not performing any contract or agreement stipulated to be performed; but that every such contract and agreement shall be specifically performed;" and adds a penalty of 100*l.* on all who pay or receive such difference-money. So that the first section expressly avoids all stock-jobbing bargains, and the fifth prohibits and declares illegal both the payment and receipt of difference-money. And certainly, at first sight, the act would seem strong enough to reach the present case. It must be recollected, however, that it has been the policy of the courts of law, out of a due regard to the interests of commerce, to uphold by every means the validity of mercantile securities. They may have been influenced also by the hardship of depriving a holder, who has given the full value, and knows nothing of the original transaction, of his remedy against one who, upon the face of the instrument, is represented as primarily liable, and thought it better to shut their eyes upon the original transaction than to prejudice an innocent party. Even where (as in the usury act) the legislature had expressly declared the *assurances*, as well as the contracts, void, it was not without great reluctance that they gave effect to this positive enactment, by declaring the instrument void in the hands of a *bond fide* indorsee without notice. (a) No wonder, then, that where the statute is silent

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(a) See the judgment of Lord Mansfield in *Lowe v. Waller*.

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as to the securities, they have inferred that the omission was intentional.

But the protection thus given by the courts is confined strictly to parties altogether strangers to the original consideration for which the security was given. A distinction, indeed, once prevailed in favour of parties who, though not immediately connected with the transaction, had nevertheless knowingly advanced money to be applied to the illegal purpose, viz. that where the offence was not *malum in se*, but merely *malum prohibitum*, its penal consequences should not be extended beyond those who were directly implicated. (a) But it is more wonderful that such a doctrine should ever have been admitted into a court of law, than that it has long been questioned (b), and was finally abolished. (c) The rule may now be laid down broadly, that whenever the party seeking to recover is in any respect contaminated with, or even privy to the illegal transaction upon which the claim was originally bottomed, his remedy, whether upon the primary consideration, or a security substituted for it, is gone. He must come into court with clean hands, or the Court will not receive him. (d) And in the case of a bill or promissory note, even an innocent holder, to whom it has been indorsed, when over-due, as, by an established rule of law, he takes it subject to all its imperfections, cannot recover upon it when it is tainted in its inception by an offence against this or any other statutory regulation. (e)

(a) *Faikey v. Reynous*, 4 Burr. 2069. *Petrie v. Hannay*, 3 T. R. 418.

(b) *Booth v. Hodgson*, 6 T. R. 405. *Aubert v. Maze*, 2 Bos. & Pul. 371. *Ex parte Mather*, 3 Ves. jun. 573. *Ex parte Daniel*, 14 Ves. jun. 192.

(c) *Cannan v. Bryce*, 3 B. & A. 179. *Bensley v. Bignold*, 5 B. & A. 335. The distinction was attempted to be revived in *Ex parte Bulmer*, 13 Ves. jun. 513. per Erskine Lord Chancellor.

(d) *Steers v. Lashley*, 6 T. R. 61. *Booth v. Hodgson*, 6 T. R. 409. *Langton v. Hughes*, 1 M. & S. 594. *Cannan v. Bryce*, *Bensley v. Bignold*, ante. *Chapman v. Black*, 2 B. & A. 588.

(e) *Brown v. Turner*, 7 T. R. 630. *Amory v. Meryweather*, 2 B. & C. 573.

**BILL OF EXCHANGE.—NOTICE OF
DISHONOUR.**

1828.

In the KING'S BENCH.—*Trinity* Term.

FIRTH v. THRUSH.

ACTION by indorsee of a bill of exchange against the indorser. This cause was tried at *Guildhall*, before Lord *Tenterden*, at the sittings after *Michaelmas* term 1827; and the main question was, whether due notice of dishonour had been given by the plaintiff to the defendant. The bill was drawn at *Frome* in *Somersetshire*, by one *Major*, payable to his own order; and he indorsed it first in his own name, and then in the name of the defendant by his authority. It became due on the 4th *August* 1826, and the plaintiff on that day addressed letters to *Major* and the defendant, directed "*Frome*," giving notice of the dishonour. No answer was received from the defendant; and *Major*, who in the meantime had become bankrupt, when asked respecting the defendant's residence, would give no information, but said that it was of no use to try to find him out, as he was not able to pay any thing. On the 16th of *October* following, the attorney of the plaintiff heard that the defendant lived at *Bruton* in *Somersetshire*, and on the 18th he addressed a letter to the defendant there, informing him of the dishonour of the bill. On this evidence Lord *Tenterden* left it to the jury to say whether, as *Thrush* had made *Major* his agent for indorsing, he had not also made him his agent for receiving notice, especially as *Major*, when applied to, had concealed the defendant's place of residence. A verdict having been found for the plaintiff, a rule *nisi*

Where the residence of a party entitled to notice of the dishonour of a bill is unknown, reasonable diligence in discovering it, and afterwards giving notice, will sustain the general averment of notice in the declaration; and where the knowledge of the residence is conveyed first to an agent of the holders, notice given two days afterwards is sufficient, the agent being allowed one day to communicate with his principal.

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to enter a nonsuit was obtained by *Brougham*, on the ground, first, that this was not a good notice of dishonour; and, secondly, that even if the particular circumstances in the case excused the plaintiff from giving regular notice, those circumstances should have been set out specially in the declaration; against which rule cause was now shewn by

Sir James Scarlett and *Barnewall*. First, *Major* having the defendant's authority to indorse, must, under the circumstances of this case, be taken to have had his authority to receive notice of the dishonour. Accordingly the jury, to whom the question was submitted, have expressly so found. If this be so, then the notice to *Major*, which was given in due time, was in law notice to the defendant. But, secondly, the plaintiff was not bound to prove that he had actually given notice, if he were able to shew circumstances which excused the omission. Now here, when the bill became due, he sent notice to the only place where from the date of the bill he could gather that the defendant was likely to be found; and afterwards, on discovering his real place of residence, again sent notice there. He did, therefore, all which the law requires of a holder; he gave such notice as the circumstances permitted him to give, and such as is sufficient to support the general averment of notice in the declaration. In *Cory v. Scott* (*a*), where there was a similar averment, and *no notice in fact* given, Mr. Justice *Bayley* is reported to have said, that "possibly circumstances which excuse the giving of notice would be evidence of notice, inasmuch as they would be evidence that the party knew the bill would be dishonoured." *Lundie v. Robertson* (*b*), and *Walwyn v. St. Quentin* (*c*), were also cited.

(*a*) 3 B. & A. 619. (*b*) 7 East, 231. (*c*) 1 Bos. & Pul. 652.

Brougham and *Chitty contra.* There is nothing in this case from which it can be inferred that the defendant had constituted *Major* his agent with respect to the bill, and clothed him with a special authority to receive notice of the dishonour. Then are the circumstances sufficient to excuse a regular notice to the defendant himself? It cannot be said that the plaintiff used due diligence in finding out the defendant, who lived at *Bruton*, only ten miles from *Frome*, where the bill was drawn, and was well known in the neighbourhood. At all events, when *Pownal*, who was the plaintiff's agent in this business, was informed where the defendant lived, he ought on that same day, or the next at farthest, to have given the notice; instead of which no letter was sent until the 18th, which was too late. [Lord Tenterden. Is there any case in which it has been decided that where the holder has been unable to find an indorser, and has been delayed in consequence, he is bound to use the same diligence when he does find him, as he would be at first?] Suppose, then, he is excused by the circumstances from giving the usual and regular notice, yet proof of this cannot be admitted under the general averment of notice. The question in *Cory v. Scott* was, whether notice was requisite at all, the bill being an accommodation-bill. It was unnecessary, therefore, to decide in that case whether the general averment is sustained by matter of excuse given in evidence; and in a note to the report of that case, given in Mr. Justice *Bayley's Treatise on Bills of Exchange*, it is said to have been the opinion of *Bayley* and *Holroyd* Js. that matter of excuse ought to be specially set forth, and could not be given in evidence under a general averment of notice. *Lundie v. Robertson* is quite different from the present case, for that was a question of waiver, or rather acknowledgment, of notice.

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In *Walwyn v. St. Quentin* the objection was never taken, and the authority of that case is doubtful.

Lord TENTERDEN Ch. J. The rule to enter a non-suit must be discharged. I am of opinion that the averment in the declaration, "whereof the defendant had notice," means such a notice as would have been available but for the special circumstances; and it is unnecessary to set forth those circumstances. I think still, as I thought at the trial, that *Major* had authority from the defendant to receive notice, and therefore that the notice to him in the first instance was sufficient. It is not necessary, however, to rest the judgment upon that, because I am of opinion that on the other part of the case such diligence was manifested by the plaintiff as is sufficient to satisfy the law. As to the time taken by the plaintiff after discovering the defendant's residence, *Pownal*, who was the attorney of the plaintiff, received the information, by letter, on the 16th, and wrote to the defendant on the 18th. If, therefore, he had a right to take a day to consult with his client, the notice here also would be sufficient. Now I think he had that right. The letter was sent to the agent, and it seems to me to be reasonable that by the same rule of law which gives the principal one day, a day should be allowed also to the agent.

BAYLEY J. I am of the same opinion. *Pownal* hears that *Thrush* lives at *Bruton*; he goes the next day to his client, who authorizes him to write, and a letter is written the day following. An analogous case is that of a banker, who holds bills for his customer; he gives notice the day after the bills become due to his customer, and the customer the day after he receives the notice.

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HOLROYD J. With respect to the point which has been raised on the pleadings, if the evidence shews that a *reasonable* notice has been given, it is enough to support the averment in this declaration.

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LITTLEDALE J. In *Bateman v. Joseph* (a) Lord *Ellenborough* says, "When the holder of a bill of exchange does not know where the indorser is to be found, it would be very hard if he lost his remedy by not communicating immediate notice of the dishonour of the bill; and I think the law lays down no such rigid rule. The holder must not allow himself to remain in a state of passive and contented ignorance; but if he uses reasonable diligence to discover the residence of the indorser, I conceive that notice given as soon as this is discovered, is due notice of the dishonour of the bill within the usage and custom of merchants." Notice, therefore, given after the discovery is due notice, and there needs no special allegation as to not being able to find the defendant, as there needs none in a declaration against the drawer by way of excuse for notice, when he has no effects in the hands of the acceptor.

Rule discharged.

(a) 2 Campb. 461.

If the holder of a bill is really ignorant of the place of abode of the drawer, or a prior indorser, it will be an excusé for the not giving of regular notice of dishonour. This is matter of law, and for the Court. But then he must use due diligence in endeavouring to discover it; and whether he has done so or not, is matter of fact, and for the jury. (a)

(a) *Bateman v. Joseph*, 12 East, 453. 2 Campb. 461. *Browning v. Kinnear*, 1 Gow. 81. *Darbishire v. Parker*, 6 East, 3. *Baldwin v. Richardson and Another*, 1 B. & C. 245. As to what is due diligence, see *Harrison v. Fitzhenry*, 3 Esp. Rep. 240. *Sturges v. Derrick*,

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In the present case, this question does not seem to have been left to the jury. Neither, perhaps, was it necessary that it should be; for if they were of opinion that *Major* was really the agent of the defendant as to this bill, then notice to *Major* would be notice to the defendant; and, at all events, there was such a privity between them, that the answer given by *Major* to the application of the plaintiff might fairly, perhaps, be regarded as dispensing, on the part of the defendant, with further enquiries, which could only prove unavailing. But then (if the notice to *Major* were not considered of itself sufficient) it became the duty of the plaintiff, as soon as the residence of the defendant was known, to lose no time in giving him notice of the dishonour; and in this case no time was lost. The fact is first known to the solicitor; he acquaints his client, and then the notice is given. One day is allowed for the communication, and one for the notice; and this is not only reasonable in itself, but is in strict accordance with the rule laid down in similar cases. (a)

1 Wightw. 76. *Beveridge v. Burgis*, 5 Campb. 262. In the latter case the holder had contented himself with making enquiry at a house in the Old Bailey, where the acceptor had made the bill payable. But Lord Ellenborough nonsuited the plaintiff, saying, “Ignorance of the indorser’s residence may excuse the want of due notice, but the party must shew that he has used reasonable diligence to find it out.”

(a) *Baldwin v. Richardson*.

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In the KING'S BENCH.—*Trinity* Term.

MARGITSON v. ARTHUR.

ACTION upon four bills of exchange by indorsee against drawer, tried before Lord *Tenterden* at *Guildhall*, at the sittings in term. At the trial the plaintiff had difficulty in proving notice of dishonour; and at last a witness was called who spoke to conversations between the plaintiff and defendant a long time after the bills became due, in which the defendant offered a composition of 8s. in the pound on all his debts, and requested the plaintiff to accept the same; but which offer, after some negotiation, was ultimately rejected.

An offer made by drawer of a bill long after it was due, to pay a composition on all his debts, and not acceded to by the holder, held sufficient presumptive evidence of due notice of dishonour.

Lord *TENTERDEN* thought this evidence sufficient, and a verdict was accordingly found for the plaintiff for the amount of the bills. A few days after in the term,

Gurney, for the defendant, applied to the Court to set aside the verdict and enter a nonsuit, on the ground that the mere proof of a conversation, long after the bills became due, respecting a general compounding with the defendant's creditors, was not enough to deprive the defendant of the right, to which every drawer was entitled, of a regular notice of dishonour; that it was a mere negotiation for peace, which had gone off; that the offer must be taken to have been made without prejudice, and that the parties on its going off, stood on their ancient rights; that the defendant, consequently,

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might still insist on the want of notice. But the Court refused the rule;

BAYLEY J. observing, that the offer to pay 8s. in the pound was an admission by the defendant of a valid existing debt owing to the plaintiff; and therefore of that which was essential to make it so, due notice of dishonour.

This decision goes farther than any of the cases which have hitherto been considered as amounting to a dispensation of regular notice of dishonour, or an acknowledgment of having received it. It is true, that an express promise to pay the amount of a bill or note after it has become due, has always been treated as presumptive evidence, from whence a jury might infer that notice had been given (*a*); but in all these cases the promise has been made with a direct reference to and in respect of the particular instrument in question. Here the proposal (for it was a proposal rather than an undertaking) seems to have been general as to all the defendant's debts, and although the plaintiff was requested to accede to it, which was certainly an admission of something due to *him*, yet for aught that appeared, he might have other claims upon the defendant to which the offer related. In short, there seems to have been no acknowledgment of his liability *on this particular bill*; and if so, it may perhaps be doubted whether the general rule has not been somewhat strained to meet the equity of the particular case. On the other ground, also mentioned in argument, viz. that the conversation amounted only to an offer of compromise and a negotiation, which having proved ineffectual, the parties were remitted to their former state, it seems difficult, if not impossible, to reconcile the decision of the Court with the case of *Cumming v. French*. (*b*) In that case also, there was a difficulty in proving due notice of dishonour. The plaintiff's attorney was at last called, who

(*a*) *Lundie v. Robertson*, 7 East, 251. *Taylor v. Jones*, 2 Campb. 105. *Gunson v. Metz*, 1 B. & C. 193.

(*b*) 2 Campb. 106, n.

swores, that after the arrest, he called on the defendant, and asked him what he had to propose in the way of settlement; to which the defendant answered, "I am willing to give my bill at one or two months;" but the offer was rejected. It was contended, that from this conversation, notice might be inferred. But Lord *Ellenborough* said, This offer is neither an acknowledgment nor a waiver, to obviate the necessity of expressly proving notice of the dishonour of the bill. He might have offered to give his acceptance at one or two months, although being entitled to notice of the dishonour of the former bill, he had received none; and although upon this compromise being refused, he meant to rely upon the objection — *if the plaintiff accepted the offer, good and well; if not, things were to remain on the same footing as before it was made:* and the plaintiff was nonsuited.

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Sittings before *Michaelmas* Term.—Before Lord TENTERDEN Ch. J.
at *Westminster*.

PIKE v. SWEET.

THIS was an action by the indorser against the drawer of a bill of exchange. A witness was called on the part of the defendant, who stated that at the time of the discount of the bill, the plaintiff had agreed that, in the event of non-payment, he would not sue the defendant (the drawer), but see to his remedy against the acceptor only. The same witness also stated that there had been, since the action brought, negotiations between the plaintiff and the acceptor, by which further time was allowed him to pay the bill; but it did not distinctly appear that the defendant had been a party to this arrangement.

If the payee and indorser of a bill agree at the time of discounting not to sue the drawer in the event of non-payment by the acceptor, he is bound by that agreement.

It is no defence to an action by the holder against the drawer, of the action.

that time has been given to the acceptor since the commencement of the action.

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Lord TENTERDEN told the jury, that if they were satisfied that the plaintiff, at the time when he discounted the bill, expressly agreed not to sue the defendant (the drawer) in the event of the dishonour of the bill, then in point of law the defendant would be entitled to their verdict.

On the second point, his Lordship told them that the liability of the defendant was not discharged by the negotiations between the plaintiff and the acceptor, those negotiations having taken place since the action was brought.

The jury returned a verdict for the plaintiff.

In this case, the promise not to sue the drawer was made at the time of the creation of his liability on the bill, viz. the delivery to the payee. Had it been otherwise, the undertaking of the latter would not have been obligatory, as having been given without a consideration to support it. And it may be laid down generally, that when once the liability of the drawer upon the instrument has attached by delivery, it is not revocable by any subsequent arrangement, except that of substituting a higher security; and then only as to the parties and privies to the arrangement, and those who take the instrument subject to the equities of it. With respect to the other point, the well-known rule is, that any indulgence given by the holder to the acceptor, whereby he would be precluded from suing him, either altogether or for a time, is a discharge to all the intermediate parties of their liability; and this, on the ground that the acceptor is the principal debtor — the person primarily liable upon the instrument — and that the rest are but sureties and guarantees for payment in case of default by him. The holder may, indeed, immediately upon his default, sue any prior party; but if he *elects to proceed against the acceptor*, he must, for the benefit of the sureties, prosecute his suit with diligence and effect. If he makes an agreement with him to grant him time for payment, he cannot, *during* the interval, sue any other party to the bill, because, in that case, he would, in

fraud of his own agreement, be enabling another to do that which he had stipulated not to do, viz. sue the acceptor immediately. Nor can he, *after the expiration of that time*, call upon any of the other parties, because they might reasonably answer him, that by his delay they had lost the opportunity which they might have had of indemnifying themselves, by taking prompt measures against the acceptor. In the present case these reasons did not apply, because, before the indulgence was given, the holder had manifested his intention of looking to the drawer for payment, and the latter would not be precluded from taking steps against the acceptor, by a promise of the holder, made subsequently to the commencement of proceedings against himself. It is obvious, from a consideration of the principle, that an indulgence to the drawer would be no discharge of the acceptor; nor, indeed, would it have seemed necessary to mention this, were not the mistake rather a prevailing one among men in business. The cases on this subject, which are too numerous to be easily comprehended within the limits of a note, will be found collected in *Chitty on Bills*, p. 290—300.

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INSOLVENT DEBTORS' ACT.—FRAUDULENT AGREEMENT.

In the KING'S BENCH.—*Trinity Term.*

MURRAY v. REEVES, Gent., One, &c.

Assumpsit. The agreement, of the breach of which the plaintiff complained, arose out of the following circumstances: One Shearer was a prisoner in execution at the suit of the plaintiff for a debt of 268*l.*; and being about to take the benefit of the act for the relief of insolvent debtors, employed the defendant, as his attorney, Court at his instigation, is against the policy of the insolvent laws, and in fraud of the other creditors, and therefore void.

An agreement by a creditor to withdraw his opposition to the discharge of an insolvent debtor, after an enquiry instituted by the

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to take the necessary steps for that purpose. When *Shearer's* petition came on to be heard, the plaintiff opposed his discharge, whereupon it was referred to the provisional assignee of the court to examine the insolvent, and investigate the grounds of opposition. In the meantime, the agreement in question was entered into between the plaintiff and the defendant as *Shearer's* attorney, and the first article was as follows: "On condition of Mr. Murray withdrawing his opposition, Mr. Reeves will undertake to consent that Mr. Murray shall be appointed sole assignee of Mr. Shearer's estate and effects." The second, third, fifth, sixth, and seventh articles were undertakings to facilitate in various ways the disposition of the insolvent's effects; and the fourth was a "guarantee that Mr. Murray, as assignee, shall receive 90*l.* or 100*l.* out of the insolvent's estate, within three weeks from his appointment as assignee, he taking the necessary steps, which Mr. Reeves will point out to him."

At the trial, which took place at the sittings after *Michaelmas* term, 1827, before Lord *Tenterden*, at *Westminster*, a verdict was taken for the plaintiff, with liberty to the defendant to move to enter a nonsuit; Lord *Tenterden* expressing a strong opinion against the legality of the contract, adding that it ought to be considered as more for the benefit of creditors that all the examinations should be completed before the discharge, than that such agreements as these should be made for the purpose of concealing any part of the transactions. A rule having, accordingly, been obtained in *Hilary* term, by Sir *James Scarlett*, cause was now shewn by

Campbell and *Wyborn*. There is nothing illegal either in the consideration or the promise which constitute this agreement. The consideration was an undertaking merely to do that which every creditor has a

right to do. It will not be denied that a detaining creditor may consent to his debtor's discharge; for the detainer being for his benefit, he may, of course, renounce that benefit. The effect would simply be, that the parties would be in the same situation as if the creditor had never opposed at all, and it certainly could not be considered the *duty* of a creditor to oppose. It will be said that this was an interference with the penal jurisdiction of the Court of Insolvent Debtors; but the jurisdiction of that court is not penal: it is exercised merely for the benefit of the creditors. When the opposing creditor is satisfied, he may, at any time, even after sentence of prolonged imprisonment by the Court, procure the insolvent's discharge. In *Whitelegge v. Richards* (*a*), a creditor sued the officer of the court for having discharged an insolvent out of custody when opposed by the creditor. But, even if the Court had a penal authority, yet here there was no ground for the exercise of it. There was not even a charge of fraud made against the insolvent; there was nothing imputed on which he could be remanded. *Nerot v. Wallace* (*b*) is very different. There, there was both a want of power to perform the promise, and, therefore, a consideration which failed, and there would have been a breach of duty in the commissioners, as public officers, had they consented to the agreement. In *Kaye v. Bolton* (*c*) an agreement on the part of the creditors to abstain, on certain conditions, from the further prosecution of a commission of bankruptcy, was held to be legal. Neither is there any thing in the promise which is contrary either to law or policy. On the contrary,

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(*a*) 3 Brod. & Bingh. 188. But the Court in that case give no opinion as to the merits of the action. The question was, whether the order for the discharge was to be considered as the act of the Court, or the officious and improper act of the individual officer who drew it up.

(*b*) 5 T. R. 17.

(*c*) 6 T. R. 134.

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the defendant undertakes to facilitate in every way the disposal of the insolvent's property, and the stipulations generally are evidently for the benefit of the creditors.

Sir James Scarlett and Hutchinson contra. The agreement is void on two grounds: first, it is a fraud on the body of the creditors; secondly, it is against the policy of the insolvent laws. It is an agreement that Mr. Murray, who stands forth to oppose on behalf of all the creditors, shall, for a private benefit, withdraw that opposition. It is plain that it was considered an advantage to him individually that he should be appointed sole assignee, and if so, then it was a fraud upon the other creditors. [Bayley J. Can only one creditor oppose?] A hundred; but one having undertaken it, and the Court having instituted an investigation, it became unnecessary for the rest to interfere. They had, however, an interest in the investigation, and the suppression of it without their concurrence would be a fraud upon them. It was incumbent, therefore, on the defendant to show that they did concur in the agreement; and he having failed to do this, fraud must be presumed. But, secondly, it is against the policy of the law. The object of that law is twofold. It is partly for the benefit of the insolvent, and partly for the prevention of fraud on his part. The Court has, therefore, a power given it by the act (a) not only to investigate but to punish. The sixteenth section gives the one, the seventeenth the other. By the latter, the Court may remand the insolvent for three years as a punishment for fraud or misconduct. Now this agreement may interrupt the jurisdiction of the Court in this respect; it may amount to the compounding of a misdemeanor. Nerot v. Wallace is in point. The bankrupt laws and the insolvent laws stand on the same footing, and an interference with the public duties

(a) 1 G. 4. c. 119.

of the commissioners in either case is equally illegal. The point decided in *Whitelegge v. Richards* has no bearing whatever on the present case. [Lord Tenterden. The question is, whether the power given by the act to remand an insolvent is intended by way of *punishment*, or merely as a declaration that the insolvent shall not be entitled to the benefit of the act.] It is quite clear on reference to the seventeenth and eighteenth sections, that it is intended as a punishment. Can a creditor by his own act, after the insolvent has been remanded by order of the Court, procure his discharge? If so, then the creditor may do an act solely for his own benefit, without regard to that of the other creditors. In *Rogers v. Kingston* (a), an agreement for withdrawing an opposition to the discharge of an insolvent was expressly held void. [Lord Tenterden.] The enquiry instituted by the Court in this case seems to have been as to the concealment of property.] That enquiry must have been either well or ill-founded. If well-founded, then the withdrawing of the opposition, and the consequent stifling of that enquiry, was a fraud upon the creditors: if ill-founded, then there was no consideration for the promise.

Cur. adv. vult.

On a subsequent day judgment was delivered by Lord TENTERDEN Ch. J. We are of opinion that this action cannot be maintained, and, therefore, that the rule for entering a nonsuit must be made absolute. The agreement upon which the action is founded is contrary to the policy of the law, and cannot be sanctioned by the Court. It takes from the commissioners the power and control over the insolvent, and from the creditors the benefit of a full disclosure, to which they are en-

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(a) 2 Bingh. 441.

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titled. We cannot but see that such bargains may in many cases protect fraudulent debtors, directly contrary to the policy of the law, and they are, therefore, void. It has been said in argument, that this is nothing more than the exercise of a power, which every creditor has, to consent to his prisoner's discharge; that his detainer is for the benefit of the creditor, and that he is at liberty to renounce that benefit even after sentence, and the insolvent is immediately discharged. But then his release within the time for which he was remanded, with respect to other creditors, may not have full effect. If the other creditors do not concur, the proceeding of the single creditor as to them becomes a nullity, and they are not prejudiced. But if, as in the case before the Court, a creditor were allowed, whilst the insolvent and his affairs are in a state of examination, to enter into an agreement with his debtor, which should have the effect of shutting out enquiry, and of giving undue facility to his discharge, it would be productive of frequent injustice to the other creditors, who, deceived by appearances, might lose the opportunity of opposing a fraudulent debtor. It is very possible also, that such bargains may operate to the prejudice of an honest debtor, who might be prevailed upon by an interested creditor to make an improvident agreement in order to obtain his liberty. For these reasons we are of opinion that the verdict cannot be sustained, and that we must make the rule to enter a nonsuit absolute.

This case may seem, at first sight, not to belong immediately to that class which forms the subject matter of these reports. But it was imagined that the decision might be useful, as shewing the futility of private agreements with an insolvent for the benefit of a particular creditor at the possible expense of the rest, and as having laid down the important rule, that though an opposing creditor may, even after a commitment by the court, consent to the discharge

of the insolvent, yet that that consent would probably be inoperative as respects the other creditors, who might still, if they thought fit, insist upon his detention. The principle of the decision is also valuable, in as far as it evinces even an astuteness in the court to detect an undue preference of the selfish interests of the individual before those of the body, in whose behalf he is virtually acting. The rule of law is sufficiently clear, viz. that an agreement which offends against positive law, or public policy, or morality (a), is altogether void.

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(a) Under this head are included all fraudulent agreements. See on this subject, besides the cases cited in the text, *Cockshott v. Bennett*, 2 T. R. 763. *Jackson v. Duchaire*, 3 T. R. 551. *Jackson v. Lomas*, 4 T. R. 166. *Leicester v. Rose*, 4 East, 372. *Jackson v. Davison*, 4 B. & A. 691. *Lewis v. Jones*, 4 B. & C. 511.

ADMISSIBILITY OF BANKER'S BOOKS.

In the COMMON PLEAS.—*Trinity* Term.**FURNESS, Assignee of GODDARD and Others, v. COPE.**

ASUMPSIT by the assignee of bankrupts to recover 60*l.*, as money paid by one of the bankrupts to the defendant in contemplation of bankruptcy. At the trial, in order to shew that the bankrupts must have contemplated bankruptcy at the time of the payment, in addition to other strong circumstances denoting such an intention, the plaintiff proposed to prove, by the production of the banker's books, that they had just before drawn all their funds out of their banker's hands. *Wilde Serjt.*, for the defendant, objected, that these books were not the best evidence, as the bankers themselves, and the clerks who made the entries, might be

Banker's
books held
admissible as
evidence to
shew that a
third party
had, on a par-
ticular day,
no funds in
their hands.

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called to prove the facts; but *Best C. J.* overruled the objection, and received the books, by which it appeared that, on the 2d *June* 1825, the bankrupts had in cash at their bankers 470*l.* 19*s.* 3*d.*; that on that day *Goddard* drew out 400*l.* (with which sum he had absconded), and that on the 4th *June* the other bankrupt drew out 70*l.* in two cheques; one of which, for 60*l.*, he paid to the defendant, thus leaving in the banker's hands a balance of 19*s.* 3*d.* only. A verdict was found for the plaintiff, and *Wilde* having subsequently obtained a rule for a new trial, amongst other grounds on that of the inadmissibility of the banker's books, cause was now shewn by

Merewether Serjt. contending, that, for the mere purpose of shewing the state of the account, the books might be received in evidence; that it was, indeed, the only way in which it could be shewn, as it was impossible for the banker's clerks to speak to the transactions from memory; that the ground of rejecting such evidence was the possible falsehood of the entries; but that these were books free from all suspicion, being kept in a public manner, and accessible to all the clerks; that there was no case expressly in point; that which came nearest was the case of *Price v. Lord Terrington.* (a)

Best C. J. The evidence of the ledger was properly received in this case, and it would be most inconvenient if we were to decide otherwise. You cannot require the

(a) 1 Salk. 285. That case was altogether different; it was an entry by a drayman of the plaintiff, *since dead*, and made at the time against his own interest. *Wilde* did not answer this part of the argument, but confined himself entirely to the other points in the cause.

principal, and all the clerks of a banking-house, to be present to speak to a transaction of this nature; and even if they were, they would not be able to speak of their own knowledge. In my opinion, the books may be looked at to prove that there was no money of the bankrupts in the bank, though it is different if you wish to prove the payment of a sum of money into the bank. In that case the clerk who made the entry must be called, and he may look at the book to refresh his memory.

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PARK J. Books may be evidence for some purposes, though not for others. Here the ledger was rightly received to shew that the bankrupts had no money in the bank at a particular day. It is a book which lies open on the table for all the clerks, to look to whenever a cheque is paid in. So the books of the *Fleet* prison have been held good evidence of the time of detainer, though not of the cause of detention.

BURROUGH and GASELEE Js. concurred.

Rule discharged.

It is difficult to see on what principle the seeming deviation from the known rule of law in this case can be explained. It cannot surely be pretended that the books of a private banker are public books, such as those of the Bank of *England* or the *East India Company*; and there is no case in which the entries in private books have been held admissible, unless they were brought in evidence against the party making them, as admissions, or unless they were made by a person since deceased, being such as at the time of entry it was against his interest to make. Indeed, it is altogether contrary to principle. The distinction here attempted to be drawn is this,—that although the banker's books would not be admissible for the purpose of shewing sums received or sums paid, yet that they might be received

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as evidence of the fact, that at a particular day there were no funds of certain individuals in the bank. But, with submission, they neither could prove, nor ought to have been admitted as evidence of, that fact. If the issue had been whether or no any thing appeared *in the books* to the account of the individuals, they would certainly have been the best evidence as to that question; but here they were used for the purpose of establishing the fact, that the balance *actually in the banker's hands* was but 19s. 3d.; and further, of showing the *transactions* by which the account had been so far diminished. Now these were facts collateral to and independent of the entries in the books; facts requiring actors, which actors were themselves alive and producible as witnesses. It was said that the actors would not have been able from memory to depose to the transactions, and that the books were much more likely to be accurate. Granted: but might not the books (if we may be permitted with deference to suggest the question) have been put into the hands of the clerks who made the entries, in order to refresh their memory?—and would not the sight of their own hand-writing have been sufficient to enable them to speak with certainty to the transactions there recorded? The presumption of the accuracy of a mere memorandum is unknown to the law. Is not the presumption rather that it is inaccurate and false, if oral evidence could have been given of the facts which it witnesses? The common law of *England*, as is well known, assigns a preference to oral testimony, and requires, for the benefit of the party against whom the proof is brought, that it shall be subjected to the scrutiny of a cross-examination, and delivered under the sanction and penalties of an oath. Whether the rule be a wise one or not, is altogether another question. It is sufficient that it exists; and it is almost a common-place, and ought to be unnecessary to remark, that it is much better to abide by a known and established rule under all circumstances, than, out of a regard to the inconvenience or hardship of a particular case, to "unsettle foundations," and introduce uncertainty into the law.

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In the KING'S BENCH.—*Michaelmas* Term.WHITMARSH and Others *v.* GENDS and GIFFORD.

DEBT on bond conditioned for the fidelity and due accounting of one *Pitman*, clerk to the plaintiffs, who were bankers. *Gends* suffered judgment by default; *Gifford* pleaded general performance. Replication, that sums were received by *Pitman*, and not accounted for. At the trial before *Littledale* J., at *Wells*, in order to prove the receipt of the different sums by the clerk, the banker's books kept by him were offered in evidence. An objection was taken to their admissibility, and it was not disputed that the persons who paid the sums were living, and that *Pitman* (the clerk) was no party to the bond. The learned Judge received the evidence, and a motion was made in *Michaelmas* term last, upon leave granted, to enter a verdict for the defendant, on the ground that this evidence could not be received; and it was contended, that these were neither public books, nor were the entries in them admissions by a party to the suit, or any one necessarily connected with the defendants; that the case of *Goss v. Watlington* (*a*) was really in favour of this view, though at first sight it might seem to be opposed to it; that the judgment of the Court, in that case as to the admissibility of the books, proceeded on the ground that they were public books, which it was the duty of the collector to hand over in a particular manner to his successor; and upon the question as to the admissibility of the receipts, the Court

Books kept by a clerk in the ordinary course of his duty, may be received in evidence in an action against a surety on a bond conditioned for his fidelity, to prove the issue that certain sums had been received by the clerk.

(*a*) 3 B. & B. 135.

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decided that, under the circumstances, the receipts of the principal were not evidence against his surety. In *Manning's Dig.*, tit. *Evidence*, it was laid down that the admission of the principal as to the amount of damnification cannot be received as evidence against the surety. In a case of *Cutler v. Kewley* (a) *Hobroyd* J. had ruled to the same effect.

LORD TENTERDEN C. J. I think the evidence was properly received. *Pitman* was taken into the employ of the plaintiffs as a clerk. The defendants entered into a bond for his fidelity, a part of the condition being that he should well and faithfully account for, and pay, and deliver over all sums which he should receive as such clerk. The issue was, Whether he had received certain sums, and not accounted for them. Now the books received in evidence were kept by *Pitman* in the regular discharge of his duty. Either he had received the sums there entered, or he had not. But we are not to assume that the entries are false; because, if it was so, the only effect would be, that the plaintiffs would have an action against the sureties on their bond, for this breach of duty in the clerk. The evidence was not an isolated entry, but regular accounts, for the faithful keeping of which the defendants were bound. It does not lie with them, therefore, to object to these accounts.

BAYLEY J. The foundation of the decision in *Goss v. Wallington* is, that the books were books kept by the collector in the discharge of his duty (b); and here, also, the keeping of the books was a part of the duty of the clerk.

(a) At Winchester Spring assizes, 1819.

(b) It does not so appear from the report.

SURETY TO A BOND OF FIDELITY.

1828.

In the KING'S BENCH.—*Michaelmas* Term.**CALVERT and Another v. GORDON, Executrix.**

DEBT on bond conditioned for the fidelity of *R. Edwards*, as collecting-clerk to the plaintiffs, whilst he should continue in their service. The issue of fact raised by the pleadings was, Whether *Edwards* had received and duly accounted for certain sums; and the point of law involved was, Whether the defendant, being the executrix of the surety, could immediately release herself from further liability by giving notice to the plaintiffs that she would no longer be responsible. The case came on for trial at *Guildhall*, before Lord *Tenterden*, at the sittings after *Trinity* term, when a verdict was taken by consent for the plaintiffs; and *F. Pollock* now moved the Court, either for a new trial, on the ground that the jury ought, upon the point of law, to have been directed to find nominal damages only on one of the breaches; or, if the Court were not inclined to grant this, then his application was, that the judgment should be arrested. The Court, with some reluctance, allowed him to proceed; and he contended, that the defendant was not answerable in damages to the plaintiffs, the liability being determined on the delivery of the notice; but

A surety to a bond, conditioned for the fidelity of a clerk or other person holding a situation of trust, cannot discharge himself from liability by giving notice to the obligee.

Per Curiam. We are not called upon now to say what effect a notice to the obligee from the surety, that from *some future day* he would no longer hold himself liable, would have in determining that liability.

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The question raised by these pleadings is, Whether the obligation would cease from the very day in which the notice is given. There has been no reason assigned why it should. A party deliberately entering into suretyship cannot release himself at any moment. It would be hard upon the master if he could. The master cannot, upon the instant, dismiss his clerk, and provide himself with another. It is said, that it will be a hardship on the surety, if his liability is to continue perhaps during the whole life of the person for whose fidelity he engages. It may be so; but we can only look to the instrument, and, judging from that, we must collect that it was his intention so to bind himself. If it be found inconvenient to incur an obligation so extensive (as it may), it may in future be matter of consideration whether it cannot by some means be limited. All difficulties would be obviated, if a provision were embodied in the instrument, that the obligor should be discharged from his liability in a specified time after due notice given.

Rule refused.

There had been a demurrer to the pleadings in this cause which was argued in *Hilary* term last, and is reported in *Barnewall and Creswell.* (a) In giving judgment on that occasion, *Bayley* J. expressed a strong doubt (though the point was not judicially before the Court) whether a surety could discharge himself by such a notice. The hint of the Chief Justice as to future surety bonds is well worth attention.

(a) Vol. vii. p. 809.

SPECIFIC PERFORMANCE OF AGREEMENT.

1828.

In the KING'S BENCH.—*Michaelmas Term.***CARPENTER v. BLANDFORD.**

ASSUMPSIT for non-performance of a contract (*a*), in which the point was this. The agreement was to be performed on a specific day. On that day the plaintiff was not ready, and appointed the next; but the defendant insisted on his forfeiture, and refused to fulfil the agreement, considering himself released by the default of the plaintiff, who thereupon brought this action.

It was in evidence, that in contracts of that kind it was not usual to insist on performance on the precise day: a day or two was considered immaterial. Lord *Tenterden* told the jury, that if the defendant meant to insist on the punctual performance of the agreement on the day specified, he ought to have given the plaintiff notice of his intention to do so, upon which direction the jury found a verdict for the plaintiff. And on motion by Sir *James Scarlett* for a new trial, the Court held that the direction of the Chief Justice was right.

(*a*) The agreement was for the letting of a public-house; but it is apprehended that the principle applies to contracts of a different kind.

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BANKRUPT'S EFFECTS.—AUTHORITY OF AGENT.

In the KING'S BENCH.—Sittings in Banc before *Michaelmas* Term.

**BAILEY, surviving Assignee, v. CULVERWELL, BROOKS,
and CARROLL.**

A broker sells goods for his principal, to be paid for by bill of exchange. Before the bill becomes due, the acceptor stops payment, whereupon the broker, who holds the goods as agent for the vendee, for the purpose of reselling them, applies to the vendee, on behalf of the vendor, for further security. The vendor accordingly authorises him

TROVER by the assignees of *William Halliwell*, a bankrupt, to recover the value of 424 beaver skins. The cause was tried at *Guildhall*, before Lord *Tenterden*, at the sittings after last *Hilary* term, when a verdict was found for the plaintiff for 1000*l.*, subject to a case of which the following is the substance.

In December 1823, the defendants *Culverwell* and *Brooks*, who are brokers, sold to the bankrupt, on account of the other defendant *Carroll*, a quantity of beaver skins then in their possession, for 427*l. 5s. 6d.*, to be paid for by the bankrupt's bill at four months on Messrs. *Walducks* and *Hancock*. The bill was accordingly sent to *Culverwell* and *Brooks* in a letter, of which the following is a copy: —

“ Inclosed you will find a bill accepted by *Walducks* and Co. for 429*l. 13s. 4d.* to balance for the beaver, and if to sell the goods, and apply the proceeds to the payment of the bill. The broker does not sell, in consequence of the unfavourable state of the market, but subsequently delivers the goods over to the vendor, the vendee in the mean time having committed an act of bankruptcy: Held, that the act of the broker being for the benefit of the vendor, must be presumed to have been ratified by him, and, therefore, that the order of the vendee was executed, and could not be revoked by the bankruptcy.

Held, also, that the mere delivery of the goods by the broker to the vendor, no demand having been made before their re-delivery to him in the same state, was not such a conversion by either as would sustain trover.

you can obtain 2s. per pound profit, sell them. At present let them remain with you on that principle.

" W.M. HALLIWELL."

" January 14. 1824."

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The bill was immediately handed over by the brokers to *Carroll*, and the goods, in consequence of the letter, remained with them for sale. On the 16th of *March*, and before the bill became due, *Walducks* and Co. stopped payment, whereupon *Culverwell* applied to the bankrupt for further security, and obtained from him a letter, of which the following is a copy:—

" Please sell the beaver you hold of mine, and take the proceeds to pay my bill on *Walducks* and Co. Any profit arising from it pay over to me, and you will oblige

" Yours, &c.

" W.M. HALLIWELL."

" Messrs. *Culverwell* and *Brooks*.

" March 16. 1824."

The skins were not sold in pursuance of this letter, but remained, in consequence of the unfavourable state of the market, in the possession of the brokers. The bill of exchange was dishonoured at maturity, of which due notice was given to the bankrupt on the 17th of *May*: and from a subsequent examination of *Culverwell* before the commissioners, it appeared, that on the same 17th of *May* the skins were attached in their hands by process out of the Lord Mayor's Court at the suit of *Carroll*. The commission of bankrupt issued on the 4th of *June* 1824, founded on an act of bankruptcy of the 21st of *May* preceding. On the 14th of *July* 1824, upon an order from *Carroll* for that purpose, *Culverwell* and *Brooks* delivered the skins to a porter, on his account; and upon the 5th of *November* following, in consequence

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of a second order from *Carroll*, they received them back into their possession, where they remained until after the trial. On the 8th of November an offer was made on behalf of the defendants by their attorneys, in the following letter addressed to the attorneys of the plaintiff:—

“ We have again seen Mr. *Culverwell* relative to the claim made by you on his firm for the beaver skins on behalf of the assignees of *William Halliwell*, and we are requested to state to you that if the assignees so require, the beaver skins shall immediately be sold; but they are not now, and never have been since Mr. *Halliwell's* order was delivered to Messrs. *Culverwell* and *Brooks* in March last, authorizing them to sell the skins and pay the proceeds in discharge of the bill given for payment of them, of sufficient value to discharge the bill, and the sale has not been effected: or the assignees may, if they think proper, take the skins on paying the bill.”

To this letter the following answer was returned by the plaintiff's attorneys:—“ The assignees claim to have the beaver skins delivered up without any condition, or payment of the value of them when they were first applied for, and they will not now consent to any sale.” On the 15th of November 1824, the plaintiff caused a demand of the skins to be made upon *Culverwell* and *Brooks*, offering at the same time to pay the charges for warehousing; but the defendants refused to give them up. In consequence of an agreement at the trial, the skins were subsequently sold for 311*l.* 14*s.*

The question for the opinion of the Court upon these facts was, first, Whether the plaintiff was entitled to recover; and, secondly, if at all, whether the full value of the skins, or nominal damages only. (a) If the

(a) The conversion relied on was the delivery of the goods by the brokers to *Carroll* on the 14th July, and as this, at most, could only be a conversion technically, by the exercise of an act of ownership,

full value, then the verdict was to be reduced to £11l. 14s. If nominal damages, then a verdict was to be entered for 1s. And if not entitled to recover at all, then a nonsuit was to be entered.

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Parke for the plaintiff. The plaintiff is entitled to recover the full value of the skins. The property was vested in the bankrupt by the sale, and the *transitus* was at an end when the bill of exchange was delivered to *Culverwell* and *Brooks*. The instant the property in the goods was divested out of *Carroll*, *Culverwell* and *Brooks* (not being the general agents of *Carroll*, but merely his brokers in that particular transaction), held them on account of the bankrupt. They had ceased altogether to be the agents of *Carroll*; for the Court cannot say that there was any undeclared trust subsisting in them on account of *Carroll*. Neither have the defendants by any subsequent transaction gained a new lien on the goods. The order given by the bankrupt to *Culverwell* and *Brooks* in his letter of the 16th of *March* in answer to their application respecting his bill, gives them no right to retain the skins for the debt due to *Carroll*. It is a direction to them to sell them and to pay over the proceeds to *Carroll*. But that order was never executed either in fact or in law: for the goods were not sold, and there was no assent, by *Carroll* (for whose benefit the order was given) to the appropriation. [*Bayley* J. If a person acts voluntarily as my agent, and does something for my benefit, I am at liberty to adopt his act.] But here *Carroll* did not adopt the act. He did not, in consequence of the order, either give new credit, or in any way alter the existing state of things.

from which no injury resulted (the goods remaining *in statu quo*, and no demand being made in the mean time), it seems that the plaintiff could only have recovered nominal damages in this action.

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It was, therefore, an order unexecuted, and consequently revocable: *Williams v. Everett* (*a*), *Yates v. Bell* (*b*), *Scott v. Porcher*. (*c*) Now the bankruptcy was a revocation. In order to make out a lien on these goods in *Carroll*, it must first be shown that the application by *Culverwell* and *Brooks* to the bankrupt for security was made by them *as agents for Carroll*. There was no express authority given them for that purpose; and none can be presumed from the mere circumstance of a previous relation of principal and agent having existed between them and *Carroll*; for they were agents of the bankrupts, just as much as of *Carroll*. It is true that if the arrangement had been communicated to *Carroll*, he might have assented to it; but not having done so, he has no legal right to the goods, the holder not having, as it were, attorned to him. And then the bankruptcy has intervened upon this inchoate and uncompleted transaction, and, by revoking the order of the bankrupt, has restored all the parties to their original rights, as they stood before the 16th of *March*, when the letter was written by the bankrupt to the brokers. There may be a hardship in this, but such a consideration is not to alter the mercantile law.

The assignees, then, were entitled to the possession of the goods; and no right having ever vested in *Carroll*, whose interest, according to the terms of the order, was not to arise until the goods were sold and the money received, *Culverwell* and *Brooks* were guilty of a conversion in handing them over to him on the 14th of *July* in breach of their duty as brokers; *Solly v. Rathbone* (*d*); and *Carroll* was guilty of a conversion in receiving them.

(*a*) 14 East, 582. (*b*) 3 B. & A. 643. (*c*) 3 Meriv. 652.

(*d*) 2 M. & S. 298. *Carroll* having been joined in the action, the plaintiff could not rely on the demand and refusal of the 15th Nov. as a conversion, because that applied only to the brokers.

F. Pollock, who was to have argued the case for the defendants, was stopped by the Court.

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BAYLEY J. The question is, what was the effect of the bankrupt's letter of the 16th *March*. There is no doubt that originally, as soon as the bill of exchange was put into the hands of *Culverwell* and *Brooks*, the property of the goods vested in the bankrupt, and that *Culverwell* and *Brooks* held them as his agents: but on the 16th *March*, *Culverwell* applies to the bankrupt; and he applies in the character of *agent for Carroll* — not, perhaps, by previous authority from him: neither is this necessary, for a subsequent ratification relates back; and the presumption being, that *Carroll* would adopt a proposition which was made for his benefit, the application may be considered as authorised by him. But the case does not rest here: on the same 16th *March* the bankrupt gives *Culverwell* and *Brooks* directions to retain the goods for the purpose of sale, and with the proceeds to pay his bill on *Walducks*. They do retain them for the benefit of *Carroll*; and his consent, subsequently given, may relate back to that day, in which case, the order having been executed, could not be revoked by the bankruptcy. Now there is, to say the least, nothing done by *Carroll* to reject the act done for him by *Culverwell* and *Brooks*; and his concurrence, therefore, in this arrangement at least (so obviously advantageous), must be presumed. *Culverwell* then stands in the transaction as agent, not of *Halliwell* only, but also of *Carroll*; and the act done by him must be considered as the act of *Carroll*. The important distinction between this case and that of *Scott v. Porcher* is this — that there the party, to whom the direction was given, never was the agent of the person for whose benefit it was given, and no assent on his part could be presumed from the circumstances. Secondly, as to the transaction of the 14th

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July, which is relied on by the plaintiff as a conversion, I am of opinion that it is not such a conversion as will sustain trover. The giving possession to *Carroll* does not work any injury to the assignees: the goods remain *in statu quo*, and no damage is done. I am of opinion that there should be judgment of nonsuit. (a)

LITTLEDALE J. I am entirely of the same opinion. I agree that the property in the goods vested originally in the bankrupt, and that *Culverwell* and *Brooks* became his agents: but when *Culverwell* subsequently applies for further security, surely he applies in the character of agent for *Carroll*, and the bankrupt gives him, *as such agent*, the security recited in the letter of the 16th *March*. It is clear, from his attaching the goods, that *Carroll* wished to get all the security he could, and, therefore, he must be presumed to have adopted the act of *Culverwell*. As to the conversion, we are not informed how the attachment was disposed of; but the handing over of the goods to *Carroll*, and receiving them back, cannot be considered a conversion, and no demand was made by the assignees in the meantime.

Judgment of nonsuit.

(a) Holroyd J. was absent from indisposition.

RIGHT OF MASTER TO PRIMAGE.

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In the KING'S BENCH.—*Michaelmas Term.*

BEST v. SAUNDERS.

INDEBITATUS assumpsit by captain of the ship *Albion* A bill of lading contained against freighter for primage. the usual words, "on payment of freight as per charter-party, together with primage and average accustomed:"

By agreement dated the 29th April 1823, between the plaintiff and one *Charles Weller*, the owner, the plaintiff agreed to take the command of the *Albion* on a voyage to *New South Wales*, and from thence to *India* or elsewhere for a cargo home; in consideration of which he was to receive 10*l.* per calendar month in full for wages, and 150*l.* in full for all cabin or other allowances. The plaintiff, accordingly, sailed with the ship on the voyage, and in the following *June*, the owner entered into a verbal agreement with the defendant for a homeward freight, the terms of which are embodied in the following letter, written by the defendant to his correspondents, the shippers, abroad :

Held, that the master had a *prima facie* claim upon this bill against the freighter for primage, and that it lay in the latter to show that there was a contract excluding that claim.

"Messrs. Saunders and Wiche, Mauritius.

"London, 6th June 1823.

"I have this day engaged captain *Weller's* ship *Albion*, commanded by captain *Best*, and calculated to carry about 600 tons of sugar, to proceed direct from *New South Wales* to the *Isle of France*, there to receive from you a cargo of as much of that article as she can carry at a freight of 5*l.* sterling per ton stipulated freight for what she can bring to the port of *London*.

"Yours, &c.

"JAMES SAUNDERS."

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In pursuance of this agreement, Messrs. *Saunders* and *Wiche*, on the arrival of the *Albion* at the *Mauritius*, shipped in her a cargo of sugar for *London*, for which captain *Best* (the plaintiff) signed bills of lading to the following effect:—"Shipped on board the *Albion*, whereof *W. R. Best* is master, now at anchor in *Port Louis*, and bound for *London*, 8962 bags of colonial sugar, to be delivered to *J. F. Saunders* or his assigns, paying freight for the said goods as per charter-party, with primage and average accustomed."

At the trial before Lord *Tenterden* and a special jury at *Guildhall*, at the sittings after *Trinity* term, the plaintiff proved that the defendant received the goods under the bill of lading, the freight of which amounted to 280*3l.*, and that the customary primage was 5*l.* per cent. upon the freight, making a sum of 140*l. 3s. 1d.*, which he claimed from the defendant.—Sir *James Scarlett*, for the defendant, contended, that there ought to be a non-suit, on the ground, first, that the plaintiff, by the agreement which he had entered into with the owner, wherein he had stipulated for a definite remuneration, had waived any claim which he might otherwise have had for primage, and was, therefore, bound by the contract made by the owner with the defendant, in which he had agreed for a certain rate of freight without any mention of primage.

Secondly, that the freight-note, which was evidence of the contract, contained no charge for primage, and the presumption, therefore, was against the plaintiff of there being any agreement to pay it.

Thirdly, that the defendant could not be liable to the plaintiff, there being no privity of contract between them; that the whole contract was between the freighter and owner, and the defendant could not be charged beyond that. And, lastly, that as the plaintiff rested his title solely on the bill of lading, which referred to a

charter-party for the terms of the freight, it was, at all events, incumbent upon him to produce the charter-party so referred to, in order that the Court might see whether it warranted the claim; and that not having done so, he could not support his action. Lord *Tenterden* reserved the points, and left the case to the jury, telling them that the action was brought upon the bill of lading; that the general rule was, that the terms of the bill of lading are adopted by the person who receives the goods under it; that in this there were the words "with primage and average accustomed," which gave a *prima facie* right to the plaintiff; that it was true the defendant was at liberty, notwithstanding these words, to show a contract excluding primage, but then the burthen of such proof lay upon him, and that in this case no such proof had been given; that the words "other allowances," in the agreement between the plaintiff and the owner, must be construed with reference to the words, "cabin allowances" which preceded them, and must be taken to apply to matters of the same kind; and that, although there was no mention of primage in the contract between the owner and shipper, yet in his opinion there was nothing to exclude it. The jury found a verdict for the plaintiff; and Sir *James Scarlett*, in this term, moved on the leave granted him for a rule to enter a nonsuit, renewing the objections which he had made at the trial, and insisting strongly on this, that the captain could have no right of action against the freighter upon the bill of lading, which was a contract exclusively between the owner and the freighter, else this inconvenience would follow, that upon one and the same instrument, evidencing one and the same contract, two different parties might each maintain an action.

Lord TENTERDEN C. J. From the earliest periods of commerce, primage, which is sometimes called the

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master's hat-money, has been paid to the captain. It was originally a gratuity, and a reward for his care and attention to the interests of those who shipped goods on board his vessel. By degrees it became an established practice, and though at first uncertain in amount, it was by custom reduced to certainty. *Prima facie*, therefore, primage is the right of the captain, and we must see whether any thing has taken place in this instance to divest him of that right. There are, it is true, different ways of stipulating for the payment of primage; it may be given for the benefit of the owner, and not the captain; but this can only be by a special arrangement among the parties. And it is said that here there was a written contract between the owner and master, in which the latter gave up his right; but in my opinion that contract had no reference whatever to the master's claim for primage. Then, as between the freighter and master, the bill of lading, after specifying the sum to be paid for freight, with a reference to some charter-party, adds "with primage and average *accustomed*," thereby expressly recognizing the customary claim of the master. But then, lastly, it is said, if the master can sue the freighter on the bill of lading, two actions may be brought upon the same instrument. It may be so; if two parties have each a separate right upon it, each may bring his action for that part which concerns himself: such a consequence may be inconvenient, but it is not contrary to law.

BAYLEY J. The owner may be entitled to an action for freight, the captain to an action for primage. The uniform usage is, that the owner is entitled to freight, the captain to primage; and each has a lien on the goods shipped in respect of his own claim. There is an implied contract recognized by the law on the part of the freighter to pay primage; and here it is *expressly*

stipulated in the bill of lading that he shall pay it. The charter-party might, it is true, be made to exclude it; but the bill of lading, *prima facie*, raises the inference that it is to be paid; and then it lies upon the other party to repel that inference by the production of the charter-party. Here no evidence was given of a contract between the owner and shipper excluding primage, and therefore the inference remained.

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LITTLEDALE J. On a consideration of the origin of primage, it is clear that it is payable of right, not to the owner, but the master. It may, however, be doubted, whether if the contract made by the owner with the shipper were for so much *in lieu of all charges*, the master would have a right to enforce his claim against the shipper. But here the agent of the shipper has expressly stipulated to pay the accustomed primage. Then as to the argument that two actions may be brought upon the same instrument, I own I see no objection to it, either in law or practice.

Rule refused.

" By the bill of lading the master undertakes to deliver the goods upon the payment of freight, with primage and average accustomed. The word *primage* denotes a small payment to the master for his care and trouble, *which he is to receive to his own use, unless he has otherwise agreed with his owners*. This payment appears to be of very ancient date, and to be variously regulated in different voyages and trades. In the *Guidon* it is called 'La contribution des chausses, ou pot de vin du maître.' It is sometimes called the master's 'hat money.'" — Abbott on Shipping, 5th edit. p. 272.

From this account of the nature of the claim, there seems no good reason for supposing that the owner can by a contract with the freighter, to which the master is no party,

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divest the latter of his right against the freighter. The freighter might have his action over against the owner, but he could hardly, it is imagined, get rid of his liability to the master.

INSURANCE.—TOTAL LOSS.—VALUED POLICY.

In the KING'S BENCH.—*Michaelmas Term.*

ALLAN and Another, Assignees, &c. v. SUGRUE.

A vessel insured on a valued policy sustained an injury by perils of the sea, the repairing of which would have amounted to more than the ship so repaired would have been *really* worth, but less than the value in the policy: Held, that the assured having abandoned, might recover from the underwriters as for a total loss, according to the value specified in the policy.

ASUMPSIT to recover 800*l.*, on a time policy for twelve months, on ship *Benson*, valued at 2000*l.*

The plaintiffs were assignees of *George Scott*, a bankrupt, and late owner of the *Benson*, and the defendant, one of the members of the *St. Patrick Assurance Company of Ireland*, was sued, under the provisions of the act of incorporation, on behalf of the company.

The *Benson*, on her return from the *Baltic*, laden with timber, was, on the 20th November 1826, put aground by the pilot, near the entrance of the old harbour of *Hull*. Whilst in this situation she listed over, and received very considerable damage by the breaking of her timbers, and straining. With much difficulty she was got into harbour, and the cargo discharged. A survey took place, and it was thought necessary, in order to a complete inspection, that she should be, in a good measure, taken to pieces. On examination it was found, not only that she had sustained great injury from the accident, but, also, that some of her upper timbers were rotten, and that the estimated expense of a complete repair (which was fixed by the

surveyors at upwards of 1480*l.*) would exceed what the vessel (which was thirty years old) would be worth after repairing. Notice of abandonment was, therefore, given by the owner on the 19th *December*, and the ship was subsequently sold by him for 438*l.* The purchaser intended to have repaired her, and again made use of her as a ship; but finding, on further inspection, that she was not worth it, he afterwards broke her up. No defence was made of unseaworthiness; the defendant having paid into Court the sum of 450*l.*, as the proportion due from the company upon the amount of the requisite repairs, deducting the sum for which she sold as the benefit of salvage. (a)

At the trial, which took place before Mr. Justice *Bayley*, at the last Summer assizes for the town of *Newcastle-upon-Tyne*, the principal question raised was, Whether, under the circumstances, this was to be considered as a total loss, so as to make the assurers liable according to the value in the policy; or, whether it was to be treated as an average? There arose, however, in the course of it, several other questions; viz., Whether the amount of the estimate of repair was not exaggerated? Whether the condemnation of the ship, as unworthy of the expense of repair, did not arise as well from discovering the decayed state of her timbers, as from the effect of the accident? and, Whether the estimate was not increased by unnecessarily ripping her up for examination? On all these points there was conflicting testimony; but they were afterwards set at rest by the verdict of the jury, who found, under his Lordship's direction, for the plaintiffs; and in answer to a question put to them by the Court, Whether the ship

(a) The St. Patrick had subscribed only 800*l.* The remaining 1200*l.* was divided among several others.

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would have been worth repairing, if her timbers had been sound, gave it as their opinion, that the damage received at sea was such as to render her unfit for repair. (a) The main question, viz., Whether this was to be treated as a total loss, and which was independent of this finding of the jury, was much discussed at the trial; *Pollock* and *Alderson*, on the part of the defendant, contending that the assured in a *valued* policy could not call upon the underwriters as for a total loss, on the ground that the ship was not worth repairing with reference to her real value; that it would be productive of great injustice, and great inconvenience, if an assurer could say, “I fix the value of this ship at 2000*l.*, but when I come to calculate whether it will be prudent for me to repair or to abandon, I will not take this estimate, but her real worth, as the basis of my calculation;” that the assured had a right to refuse the abandonment, and to offer to put the vessel into complete repair, when, as in this case, the estimated expense would fall short of the value agreed in the policy; that it was true the assured had not done this, but that was because the vessel was sold *as a ship*; that the contract, properly considered, was but a contract of indemnity; and the question, therefore, was, What loss had the assured actually sustained?

BAYLEY J. The question is, Has he lost the ship? I take it there is no distinction between a valued and an open policy in that respect. It leads, it is true, to different consequences; but the question still is, Is the ship so much disabled by the peril secured against, that

(a) Something was said about the notice of abandonment being too late, and a subsequent waiver of the abandonment by the act of the owner in selling the ship, *as a ship*, without the concurrence of the underwriters; but these points were not pressed.

no prudent man will repair her? It is said, that though not worth repairing by the owner, she is worth repairing by the assurers; and perhaps if they had given notice as soon as she came into the dock that they would repair her, that might have occasioned some difference. I have felt in the course of my experience the greatest possible mischief resulting from valued policies, and I should be glad to have been able to say, "In a valued policy you are only entitled to recover the real value of the ship." I remember a case, where a vessel on a *West India* voyage, having just landed her cargo, went down to the bottom: she was valued at 3000*l.*, and the captain had instructions to sell her for 1000*l.*, yet it was held that the owner might recover the 3000*l.* You have no right upon a question of total or partial loss to make a distinction as between a valued and an open policy.

After the finding of the jury, leave was given to the defendant to move that the verdict be set aside, and in case the arbitrator to be appointed (for it was agreed that the damages should be settled out of Court) should award that enough had been paid into Court, a nonsuit be entered, or if not, that the damages be reduced to the amount of the award.

Accordingly in this term the motion was made by *F. Pollock*, who strongly urged on the Court the arguments advanced at the trial, and contended, moreover, that this being a *constructive* and not an *actual* loss, all that could be justly asked was to replace the vessel in its former state; and that by doing this the assurer had fulfilled his contract of indemnity. If the value agreed in the policy were taken as the measure of an actual loss, it ought to be taken also as the measure, by reference to which the propriety of repairing should be judged in case of a constructive loss. Constructive loss was but a technical term, a creation of law, and ought to be

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governed and modified by the principle and equity of the case. Here the ship existed in specie, and was capable of being repaired. It might not, perhaps, have been prudent in another to repair her, but it would certainly have been worth the while of the assurers to have done so. This was the first time the question had been before the Court, not a single case being reported which could be brought into comparison. The Court, therefore, must have recourse to the principle of these contracts, which was, that the assured should be placed in the same state as he would have been if the accident provided against had not occurred.

Lord TENTERDEN C. J. I think the question whether the loss is to be considered total or partial is the same whether the value is mentioned in the policy or not. The only difference between the two is this, that if there be a total loss, in the one case the value must be ascertained *aliunde*, and in the other case there is no need of further enquiry, the value having been settled by agreement. In my mind, then, there is no distinction, as far as this question is concerned, between an open and a valued policy. The main point is, Was there a total loss? Now the jury found that the ship was not worth repairing. She was no longer, therefore, to be deemed a ship, but rather materials for another ship; and that is in law a total loss, where the vessel ceases to exist for any purpose as a vessel. I am, therefore, of opinion, that the assurers must pay their proportion upon the 2000*l.*, minus the value of the materials; and

BAYLEY and LITTLEDALE Js. concurring,
The rule was refused.

**RIGHT OF SELLER TO RETAIN UNTIL
PAYMENT.**

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In the KING'S BENCH. — *Michaelmas* Term.

NEW v. SWAIN.

ASSUMPSIT. The plaintiff had bought of the defendant several bags of hops for 1400*l.*, to be paid by bill of exchange at three months. The bill was given: but the plaintiff having no convenient place for depositing the goods, agreed to leave them with the defendant, who kept a warehouse for the purpose, at a stipulated rent for the warehouse-room. Before the end of the three months the plaintiff sold the hops again to a Mr. Amos; but the bill having been dishonoured when due, the defendant refused to deliver them. The plaintiff then proposed that 700*l.* (half the amount of the bill) should be paid on condition that the defendant would deliver half the bags of hops to Mr. Amos: but this also was refused. Two months afterwards the bill was paid, and the hops thereupon delivered; but a reduction in the price having taken place in the meantime, the plaintiff sustained a loss, for which he brought this action. The declaration contained several special counts: the first set stating with particularity the contract of sale, and deducing from thence the implied undertaking of the defendant to deliver the hops on request, &c.; and the fifth count averring an undertaking to deliver them on payment of the warehouse rent.

At the trial before Lord Tenterden at *Guildhall* during the sittings after *Trinity* term, the plaintiff was nonsuited, on the ground that the seller having possession

The buyer of goods agrees to leave them in the warehouse of the seller, paying a certain rent for the room: Held, that upon the dishonour of the bill given, according to the bargain, in payment, the seller, who had still the goods in his warehouse, had a right to retain them until payment of the price.

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of the goods at the time when the bill was dishonoured, had a right thenceforth to retain them until payment of the price : and

Sir James Scarlett now moved to set aside the non-suit and for a new trial, contending that there was in this case an actual delivery of the goods to the buyer. By the agreement to receive a rent for the warehouse room, the defendant, he said, admitted that he had no longer the possession in his own right. From that time he held them merely as the warehouseman and agent of the buyer. Then, having once divested himself of the possession, his lien was irrevocably gone. A lien must arise out of something at the time of the contract, and cannot be created by matter *ex post facto*, such as in this case, the non-payment of the bill. The defendant here has waived his lien, and elected to take his remedy on the bill : nor can he be allowed the choice of availing himself of a contract which he has entered into as the consideration for parting with the goods, or of insisting on the right which he might otherwise have had of retaining the possession until payment. [Bayley J. It is not properly a lien, but a right growing out of the original ownership, and not destroyed by the loss of possession.] Undoubtedly, in certain cases, the seller has a right to resume even after he has parted with the possession—he has the right of stoppage *in transitu*; which, though originally an equitable power, has long been recognized at law : but this right is exercised in cases of a general suspension of payment, or known insolvency of the buyer, and is founded rather on a supposed incapacity on his part to receive or administer. Here there is nothing of that kind : besides, even in that case, if the delivery be once complete—if the buyer have gained possession of the goods even constructively, the right of stoppage is gone. Now in *Hurry v. Mangles* (a),

Lord Ellenborough held, in a case very similar to the present, that the acceptance of warehouse-rent by the seller was a complete transfer of possession to the purchaser.

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Lord TENTERDEN Ch. J. We are all of opinion that, on non-payment of the bill, the defendant had a right to retain the goods. The general rule is well known, and we do not think that the right was in this case taken away by the agreement for rent.

BAYLEY J. Where the owner of goods sells on credit, the buyer has a right to immediate possession: but if he suffer the goods to remain until the period of payment has elapsed, and no payment in fact is made, then the seller has a right to retain them. There is no difference in principle whether the seller charges the buyer with a rent or not. They are still in his possession.

[Some discussion then took place as to the fifth count of the declaration, and the Court ultimately granted a rule *nisi* on that count.]

The point determined by the Court was this:— That there was no obligation in law on the defendant, *as incident to the sale*, to deliver the goods after the dishonour of the bill, until payment of the price. The rule as laid down by *Bayley J.* has never before, so far as the editors are aware, received the positive sanction of judicial authority. It seems, however, so reasonable, and so consistent with the principles which govern the contract of sale, that it will be readily acquiesced in. The same learned Judge, in delivering the judgment of the Court in the case of *Bloxam v. Sanders* (a), has some remarks, the general usefulness of

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which will justify us in transcribing them. "Where goods are sold, and nothing is said as to the time of the delivery, or the time of payment, and every thing the seller has to do with them is complete, the property vests in the buyer, so as to subject him to the risk of any accident which may happen to the goods, and the seller is liable to deliver them whenever they are demanded, upon payment of the price; but the buyer has no right to have possession of the goods till he pays the price. The seller's right in respect of the price is not a mere lien, which he will forfeit if he parts with the possession, but grows out of his original ownership and dominion, and payment or a tender of the price is a condition precedent on the buyer's part; and until he makes such payment or tender, he has no right to the possession. If goods are sold upon credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right of possession and the right of property vest at once in him; but his right of possession is not absolute, it is liable to be defeated if he becomes insolvent before he obtains possession. *Whether default in payment, when the credit expires, will destroy his right of possession, if he has not before that time obtained actual possession, and put him in the same situation as if there had been no bargain for credit, it is not now necessary to enquire*, because this is a case of insolvency, and in case of insolvency, the point seems to be perfectly clear." (a)

It will be seen, however, that in all which is here said, the learned Judge excludes the case where there has been an actual possession by the buyer. And the real question in the present case is, Whether there was not at the time of the sale an actual transfer of the possession, as well as the right, to the buyer? It will not, we imagine, be doubted, that if there had been, even for an instant, a corporeal delivery of the goods to the buyer, any subsequent resumption of the possession by the seller, would not, unless by the express agreement of the parties, revest him with his former rights. And where is the difference, not in principle only but in fact, between such a case and the present? If con-

(a) See also the case which immediately follows, of *Bloxam v. Morley*.

structive delivery is recognised at all by the law, it is difficult to conceive a case in which the symbolical transfer of possession is more complete. By the agreement for a rent for the warehouse room, the relation of the parties is altogether changed. The buyer virtually says to the seller, "The goods are now mine, and I take them; but as I have no warehouse of my own, I must deposit them with some one who has. Do you, then, keep them in your warehouse *for me*, and I will pay you a rent for the use of the room." Thenceforth the seller has the possession, not in his character of former owner, exercising a qualified right of possession, but simply as the agent and warehouseman of the seller. For this purpose he may be considered as a different individual, the identity of person being merely accidental. With great submission, therefore, the stipulation for rent does not seem quite so immaterial a circumstance as the Court were inclined to consider it. The *actual receipt* of such a rent was considered by Lord *Ellenborough* in the case referred to in argument (a) as a conclusive token of the change of possession. There, also, there had been no actual corporeal delivery of the goods, and no transfer in the books, but the defendants, the sellers, had received warehouse rent for the accommodation of the goods; and the question being whether they had a right to stop them *in transitu*, Lord *Ellenborough* said, "The acceptance of warehouse rent was a complete transfer of the goods to the purchaser. If I pay for a part of a warehouse, so much of it is mine. This is an executed delivery by the seller to the buyer. It would be overturning all principles to allow a man to say, after accepting warehouse rent, 'the goods are still in my possession, and I will detain them till I am paid.' The *transitus* was at an end. The goods were transferred to the person who paid the rent, as much as if they had been removed to his own warehouse, and there deposited under lock and key." (b) It seems, therefore, that unless a ma-

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(a) *Hurry v. Mangles*, 1 Campb. 452.

(b) His Lordship expressed the same opinion in a subsequent case of *Harman v. Anderson*, 2 Campb. 243. As to the right of stoppage, and what amounts to a constructive delivery, see the cases referred to in *Bartram v. Farebrother*, *ante*, p. 42.

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terial distinction arises out of the receipt of the rent in the one case, and the agreement to receive it in the other, Lord Ellenborough's opinion in this respect is at variance with the present decision, and consequently must give way.

FRAUDULENT SALE.

GUILDFHALL, Dec. 3.—Before Lord Tenterden Ch. J.

FERGUSON and Another v. CARRINGTON.

In an action for goods sold and delivered, evidence is not admissible on the part of the plaintiff, which tends to invalidate the sale.

Assumpsit for goods sold and delivered under the following circumstances:—

The plaintiffs carried on business as manufacturers of silk and ribbon in *Wood-street, Cheapside*, and the defendant a retail business in *Bridge-street, Blackfriars*. From the commencement of the present year down to the end of *May*, the plaintiffs had supplied the defendant at various times with goods in the way of their trade, amounting altogether to the sum of 282*l.* The defendant had given his acceptance at a short date for the amount of each parcel of goods supplied, the plaintiffs deducting 5 per cent. discount. Shortly after the last delivery of goods, the plaintiffs discovered that the defendant was carrying on a system of fraud, in obtaining goods upon credit, and immediately sending them round to small retail shops, and selling them from 30 to 50 per cent. under the cost price, for ready money, the quantity sold at the defendant's own premises, in the fair and ordinary way of business, being very inconsiderable.

At the trial, *F. Pollock*, for the plaintiffs, proved the delivery at various times of goods to the amount of 282*l.* On cross-examination, however, it appeared that no one

of the bills, which had been given by the defendant for the goods, was due when the action was brought; whereupon a witness was called for the plaintiff, to prove the gross fraud by which the goods had been obtained, and the manner in which they had been disposed of by the defendant.

This was objected to by Sir *James Scarlett*, on the ground that the plaintiffs, having brought their action against the defendant on a contract for goods sold and delivered, could not give any evidence with a view to supersede or invalidate that contract; that they were bound by their declaration, which proceeded on the ground, that there was a *bona fide* contract of sale.

Lord *TENTERDEN* said, that the evidence proposed was not admissible. "I think," said his Lordship, "that you must either treat the whole contract as a nullity, or you must be bound by it. You cannot treat it as a sale, and at the same time disavow it as such. If you now reject it altogether as a sale, you should have brought a different action. It might have been otherwise if you had demanded prompt payment for the goods; but here the plaintiffs themselves apply to the defendant for bills; they draw them, and procure the defendant to accept them. In this action, at least the plaintiffs must be bound by their contract; and the bills not being due when it was commenced, the credit had not expired, so as to entitle them to sue for the amount in an action for goods sold and delivered."

Verdict for defendant.

It is an established rule, that where bills of exchange have been given in payment for goods, an action cannot be brought for the price until the bills are at maturity. By taking the bills the seller virtually agrees to give credit to

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the buyer for the period of their currency; and he cannot, in violation of this compact, sue him before the expiration of that period. But the plaintiffs in this case were apprehensive that if they waited so long, they should lose all chance of being paid, and therefore brought their action prematurely. Then being pressed by the rule of law just mentioned, they wished to show circumstances which warranted them in treating the bills as a nullity. But Lord *Tenterden* thought that the tendency of such proof would rather be to avoid the contract altogether, as being bottomed on fraud, and that the defendants, who had elected, by their mode of declaring, to consider the sale as valid, could not now be admitted to set up any thing which would invalidate it. If they had chosen to consider the whole transaction a nullity, as being founded in fraud on the part of the defendant, they might have done so; but then their form of action should have been *trover* to recover the possession of the goods.

BANKRUPT'S EFFECTS.

GUILDHALL, Dec. 22.—Before Lord Tenterden and a Special Jury.

**WILKINSON and Another, Assignees of FRISBEY, a
Bankrupt, v. REAY and Another.**

Goods entered in the bankrupt's name at the docks, the warrants for which are held (but not strictly in pledge) by persons to whom he is under liabilities for advances, are goods "in the order and disposition of the bankrupt," and pass to his assignees.

ASSUMPSIT for money had and received to the use of the assignees. The question was, Whether a stock of wines, once the property of the bankrupt, was in his disposition, order, and control at the time of his bankruptcy?

The following were the facts of the case: — *Frisbey* (the bankrupt), carried on the business of a wine-merchant, and pass to his assignees.

chant in the city, and about the month of *June* 1827, having some pipes of wine in the *London Docks*, he transferred them into the name of the defendants, who at that time were largely in advance for him. This transfer was made at the request of the defendants, in order that they might see how *Frisbey's* property was disposed of, and that no other creditor might be preferred to themselves. *Frisbey*, however, continued to conduct the sales of the wine, his practice being to procure from the defendants such warrants as were wanted for the delivery to the different purchasers. (a) A short time after the transfer of the wine into the defendants' names, a clerk of the bankrupt represented to the defendants, that it was highly injurious to the credit of the bankrupt not to have the wines standing in his own name in the docks, and that unfavourable reports had already gone abroad in consequence. Whereupon the defendants, who were still under heavy advances to *Frisbey*, and naturally anxious to support his credit, agreed to re-transfer the wines into his name at the docks, at the same time taking the warrants for them into their own possession, with the same view as before, of watching over and controlling the disposal of the wine, *Frisbey* conducting the sales as before. *Frisbey* became a bankrupt in *December* 1827, and such of the wines as remained unsold, and for which the defendants thus held the dock warrants, were in the bankrupt's name at the docks at the time of his bankruptcy. The defendants having subsequently sold them, the assignees now sought

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(a) It has long been the practice at the East India and West India Docks to issue dock-warrants, if required, to the persons in whose names the entries are made in the books. At the London Docks it has only obtained in the last three years, having commenced in Dec. 1825, when the necessities of commercial men required every facility to be given to the transfer of property.

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to recover the amount, on the ground that they were in the order and disposition of the bankrupt at the time of his bankruptcy. *Campbell*, on behalf of the defendants, relied on the cases of *Lucas v. Dorrien (a)* and *Greening v. Clark (b)*, as deciding that the delivery of the dock warrants is a complete transfer of the property which they represent; and that the bankrupt could not be said to have the order and disposition of the wine in question, when he had not the dock warrants, by which alone he could make any order or disposition of them.

Lord TENTERDEN, in summing up to the jury, said, I admit that if the dock warrants were delivered on a sale, or if they were pledged to the defendants, the present plaintiffs could not recover. But these never were pledged to the defendants. If they had been taken as pledges, the defendants would not have let them out of their hands without payment of some part of their debt; whereas they do not seem to have ever made any such stipulation. The defendants, by the course they adopted, enabled the bankrupt to keep up an appearance of credit, the very case which the act was intended to prevent.

Verdict for plaintiffs.

(a) 7 Taunt. 279.

(b) 4 B. & C. 316.

**RIGHT OF PART OWNERS TO THE
SHIP'S EARNINGS.**

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In the KING'S BENCH.—*Michaelmas* Term.

**HOLDERNESS and Another, Assignees of FOXTON, a
Bankrupt, v. SHACKELS.**

TROVER for twenty tons of whale oil. At the trial before Mr. Justice Bayley, at the Spring assizes for the county of York, a verdict was found for the plaintiffs, subject to the opinion of the Court on a case which was in substance as follows:—

The bankrupt *Foxton*, jointly with the defendant, a person of the name of *Locking*, and others, was part owner of the ship *Jane* of *Hull*, a vessel engaged in the whale fishery. *Locking* was the ship's husband. The usual mode of managing the cargo was as follows. On the arrival of the vessel at *Hull*, the blubber was landed and deposited in a yard belonging to the defendant, in which were several warehouses; one of these was rented from the defendant by the owners of the ship *Jane*, and appropriated exclusively to that ship. The blubber was boiled in a boiling house in the defendant's yard, by a person employed there as foreman, and paid by the owners of the several ships; and for this a certain price per ton was charged by the defendant. The oil thus obtained from the blubber was put into casks. Each part owner's share was then weighed out, and placed separately in the warehouse rented by the owners of the ship, the particular casks being marked with the owner's initials in chalk. It was the practice for the foreman, who kept the keys of the warehouse after this division,

A part-owner of a ship is not entitled to his share of the ship's earnings until he has paid his proportion of the outfit and expenditure for the voyage; and a part delivery of his share does not necessarily defeat the lien which the other part-owners have upon the remainder.

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to deliver to the separate orders of each owner the oil belonging to him, unless he previously received a notification from the ship's husband, that the share of the disbursements due from any particular owner had not been paid, in which case the oil was detained till the demand had been satisfied.

In June 1825, the ship *Jane* arrived with a cargo. The usual course, as detailed above, was followed on that occasion. The share weighed and set apart for the bankrupt *Foxton* before his bankruptcy, was twenty-nine tons and thirty-six gallons. The casks in which it was contained were set apart in the ship's warehouse, and had the bankrupt's initials upon them in chalk. In pursuance of orders given at different times by *Foxton* before his bankruptcy, twenty tons of this oil had been delivered out, but the remaining nine tons and thirty-six gallons were in the ship's warehouse at the time of the bankruptcy. In January 1826, at which time *Foxton* stopped payment, the foreman had notice from *Locking*, as ship's husband, not to deliver to *Foxton* the remaining oil, his share of the disbursements of the ship not having been paid. *Locking* himself became bankrupt in the following April: there were two accounts between him and *Foxton*; one the ship's account, and the other a general account current. In the former it appeared, that, after charging every disbursement on account of the vessel as if actually paid by him, (except the rent of the warehouse and the charges of boiling, which were still owing to the defendant,) there remained due from the bankrupt *Foxton* at the time of his bankruptcy, in respect of his share of the ship, the sum of 56*4l.* 12*s.* 10*d.* This sum the defendant and the other owners paid up by deductions from balances which *Locking* owed them.

Locking had not, when he failed, paid every disbursement; but he did afterwards pay all by money received from the other owners. Upon the general account cur-

rent there was a balance against *Locking* of 201*l.* 7*s.* 4*d.*, but *Foxton* had credit thereon for two of his own acceptances for 300*l.* and 450*l.*, which were afterwards dishonoured. On the 8th *January* the plaintiffs, as assignees of *Foxton*, demanded possession of the nine tons and thirty-six gallons of oil from the defendant, offering to pay to him a sum which exceeded what he demanded in respect of rent and charges for boiling; the amount of which he had himself, by an account in his own hand-writing, fixed at 59*l.* 6*s.* The defendant, however, refused. The value of the oil so detained was 220*l.* 10*s.* Upon these facts, if the Court should be of opinion that the plaintiffs were not entitled to recover, a nonsuit was to be entered.

Alderson for the plaintiffs, contended, first, that even if the defendant had originally a lien upon the oil, yet he had subsequently divested himself of it. There had been a part delivery, by the act, or at least with the concurrence, of the defendant, of the twenty tons, and this operated as a complete delivery of the whole, *Slubey v. Heyward and Others* (a), *Hammond v. Anderson*. (b) Again, the very charge of warehouse rent was an acknowledgment that the property was in the bankrupt, *Hurry v. Mangles*. (c) And, lastly, the marking of the casks with the initials of the bankrupt, and setting them apart for his use by the authority of the defendant, was an appropriation and transfer of possession to the bank-

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(a) 2 H. Bl. 504.

(b) 2 N. Rep. 69.; and see 5 B. & C. 865., where Littledale J. says, in cases of lien or stoppage in transitu, it may be considered that a delivery of part is in the nature of a waiver of the lien or right to stop in transitu.

(c) 1 Campb. 452. See *New v. Swain, ante*, p. 193. and the cases there cited, and *Winks v. Hassall, post*.

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rupt, *Stoveld v. Hughes*. (a) From the authorities quoted, it was clear that these acts amounted to a complete and irrevocable delivery. In the case of a sale, even the right of stoppage *in transitu* would have been determined. And had this been a sale by the defendant to the bankrupt, for which payment had not been made by the bankrupt, yet the assignees would have been entitled to sue in trover for the goods, and the defendant must have proved under the commission for his debt. The practice which prevailed among the owners of not delivering the share of the cargo until the share of the expenses was paid, did not in this case affect the question, because here there had been a delivery.

But, secondly, he maintained that there never was a lien upon the oil at all. Part owners of ships, he said, were merely tenants in common, not joint tenants; and it had been decided in *Smith v. De Silva* (b), that the assignees of one of the part owners who had become bankrupt, were entitled to recover his full share of the profits of the adventure, although he had paid a small part only of his share of the expenses of out-fit, &c. and although the promissory notes which he had given for the remainder had been taken up by two of the other part owners who had paid the value of them to the ship's husband. It was true, that in *Doddington v. Hallett* (c), Lord Hardwicke had decreed to the other part owners a specific lien on the share of one in respect of what they had paid, or were liable to pay, for the equipment of the ship; but that case had been overruled in *Ex parte Young* (d) and *Ex parte Harrison* (e), in which Lord Eldon decided, that there was no lien on the share of one part owner (g), in respect of a balance due for the

(a) 14 East, 303., and see 2 B. & C. 545.

(b) Cowp. 469

(c) 1 Ves. 497.

(d) 2 Ves. & B. 242.

(e) 2 Rose's B. C. 76.

(g) i. e. of his share *in the ship*.

freight and earnings, to the rest. He also contended, that if any thing were due at all from the bankrupt, (which, upon the state of the accounts, he denied,) it was, at all events, to *Locking*, and not to the defendant, that it was due.

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Parke, for the defendant, was proceeding to argue that he had a right to retain the remaining portion of the oil until the bankrupt's share of the charges upon it was paid, on the same principle that the assignees would have been disabled from suing for his share of the freight; as to which Lord *Eldon*, in *Ex parte Young*, observed, "There is no doubt that freight is liable to the joint demands. As to the ship, it stands upon the nice distinction of a tenancy in common." He was then stopped by the Court.

Lord TENTERDEN C.J. *Ex parte Young* is decisive in this case. If one partner becomes bankrupt, his assignees cannot claim his share of profits, unless they pay the sums due upon the outfit and other charges. The case of *Smith v. De Silva* may have been rightly decided if *De Silva* was not a partner, but the report in the statement of the facts is entangled and obscure. (a) As the account stood, it is clear that *Foxton* was indebted to his partners; and, therefore, the objection to the right claimed by them to retain the oil, on the ground of want of interest, entirely fails. With respect to the last point which remains to be considered, namely, whether the putting the bankrupt's initials upon the casks, and separating them from the rest, amounted

(a) See the remarks on this case in Abbott on Shipping, p. 19. and 77. 5th edit. It does not appear that the ship's husband was a part owner until after the bankruptcy, when he purchased a moiety of the third share of one of the others.

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to a complete delivery, it is necessary to look to what was the practice in antecedent voyages. Now, connecting these things with what afterwards took place, I am of opinion that this was not an absolute, but only a qualified appropriation, depending upon and subject to the right of the ship's husband to stop it. It was liable, therefore, to be devested in the event of non-payment of the charges upon it, and here it was actually so devested.

BAYLEY J. This was a joint adventure, and the course was, first, to deduct the expenses incurred to obtain the oil, and then to divide the profits. No partner, therefore, had a right to his share of profits until he had paid his share of the expenses of procuring the oil. If solvent, he might pay in money; if not, then the part owners might retain to pay his share. Here *Foxton* was a bankrupt, and could not pay. Then justice and law require that he should pay out of his share of the oil. It is said that here was a delivery; but it was not a perfect delivery. The removal of part was not a giving up of the residue. That remained where the joint property of all remained, and they might well let the bankrupt take away twenty tons, because the nine which remained would be sufficient to answer the demands upon him. Then the debiting him with a portion of the warehouse rent, as explained by the usage which prevailed between the parties, does not vest the property in him. The rule for a nonsuit must, therefore, be made absolute.

Rule absolute.

The words of Lord *Eldon*, in *Ex parte Young*, are as follows: — “*Doddington v. Hallett* I know, from a manuscript note, to have been Lord *Hardwicke*'s deliberate judgment.

In a case of joint property, I admit, there cannot be much difficulty; it is different in a tenancy in common, and in an undivisible personal chattel. I certainly differ from Lord *Hardwicke*, but I hesitate to decide against his deliberate judgment in a cause upon a petition in bankruptcy. The better way will be at present to intimate my opinion to be against this lien, leaving the parties, if dissatisfied, to apply for a rehearing. I have no doubt that freight is liable to the joint demands. As to the ship, it stands upon the nice distinction of a tenancy in common."

In *Ex parte Harrison*, which occurred soon afterwards, the petition, which was presented under circumstances similar to those in *Ex parte Young*, was dismissed. The general rule is thus laid down by Lord *Tenterden* in his treatise on shipping:—"The interest of part owners in the profits and loss of an adventure undertaken by their mutual consent, is not affected by the bankruptcy of one of them taking place after the commencement of the voyage, although he has not paid his full share of the outfit. In such a case, if the other part owners have in that character paid the expense of the outfit, or made themselves responsible for it, they will have a right to deduct his share thereof from the portion of the profits of the voyage to be paid to his assignees." Fifth ed. p.77.

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**BILL OF EXCHANGE.—NOTICE OF
DISHONOUR.**

In the KING'S BENCH.—*Michaelmas Term.*

NORTON v. PICKERING.

A. draws and
B. accepts a
bill for the
accommoda-
tion of **C.**, the
first indorsee.
Neither **A.**
nor **C.** has
any effects in
the hands of
B.; yet this
does not sup-
persede the
necessity of
notice of dis-
honour to the
drawee from a
subsequent in-
dorsee, who
was ignorant
of the conco-
ction of the
bill.

INDORSEE against drawer of a bill of exchange payable to the drawer's own order. The bill had been both drawn and accepted at the request of and for the accommodation of the first indorsee, from whom the plaintiff had received it in payment of a debt for goods sold, without any knowledge of the mode of its concoction. Neither the drawer nor the first indorsee had any funds in the acceptor's hands at any time during the currency of the bill, and no notice of the dishonour had been given to the drawer. The plaintiff was thereupon nonsuited, with leave to move to enter a verdict. Accordingly, in this term the motion was made by

Milner, who admitted that it had been decided in *Cory v. Scott* (a) that the drawer was entitled to notice, even though he had no effects in the acceptor's hands, if on payment of the bill he would have an action over against any other party; but endeavoured to distinguish this case, on the ground that in *Cory v. Scott* it did not appear that the holder was ignorant of the circumstances under which the bill was got up; whereas here he was certainly not privy to the concoction, and had taken it in the ordinary course of business. He contended,

therefore, that he had a right to avail himself of a circumstance which the law considered as dispensing with the necessity of notice. He cited also *Walwyn v. St. Quentin* (*a*), as being at variance with the decision in *Cory v. Scott*. But the rule was refused.

Lord TENTERDEN Ch. J. observing, that the case of *Cory v. Scott* was rightly decided, and intimating an opinion that it would have been better for the interests of commerce if no circumstance had ever been admitted as an excuse for the want of notice.

(*a*) 1 B. & P. 652.

The reason ordinarily assigned for requiring notice to the drawer is, that by timely advertisement of the refusal of the drawee or acceptor, he may have the opportunity of immediately removing whatever effects he may have placed in the hands of the latter. For it is always presumed, until the contrary is shewn, that the drawee, and, *a fortiori*, therefore, the acceptor, has funds of the drawer in his possession. But if it be satisfactorily shewn that the drawee had not in fact, at any time during the currency of the bill, effects of the drawer sufficient to satisfy it, then, as the drawee could not possibly be prejudiced by the want of notice, the law does not in general insist upon the giving of it.

Notice to an indorser is required on the ground, that otherwise his claim upon the prior parties to the bill might be prejudiced by delay. And it is evident that the principle of that rule is applicable to the case of a drawer, who has incurred the liability solely for the benefit of the indorser. There is, however, this difference: the claim of the drawer upon the indorser in such a case is not apparent upon the instrument, and a person taking it without a knowledge that he has any such claim, can hardly be accounted guilty of negligence in not giving him notice on this account. It was in this view, probably, that the reasoning of the Court proceeded in *Walwyn v. St. Quentin*, a case exactly like the

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present, where notice was considered unnecessary. But, it is answered, that the drawer is prejudiced *in fact* by the omission of the holder to do that which is the usual and regular course of proceeding, and when he calls upon the Court to excuse that omission, it is incumbent on him to shew that no injury could have been sustained thereby. And this certainly appears to be the sounder conclusion.

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BILL OF EXCHANGE.—NOTICE OF DISHONOUR.

In the KING's BENCH.—*Hilary* Term.CLOWES *v.* ——.

When the acceptor of a bill positively refuses payment, notice of the dishonour may be given during the same day on which the bill becomes due.

INDORSEE against drawer of a bill of exchange. Verdict for plaintiff. Notice of the dishonour had been given early in the same day on which the bill became due. And *Denman* moved to enter a nonsuit, on the ground that this notice was premature, and consequently inoperative. The same objection, he observed, had been taken in *Hartley v. Case* (*a*), but not noticed in the judgment, the Court having decided on another ground.

Per Curiam. If the notary's clerk who presented the bill had promised to go back to the acceptor in the course of the day for his final answer, that might have presented a different question for the consideration of the Court; but after an unqualified refusal on the part

(*a*) 4 B. & C. 339.

of the acceptor, notice of the dishonour might be given immediately. (a)

Rule refused.

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(a) See *Burbridge v. Manners*, 2 Campb. 193. acc. In *Leftley v. Miles*, 4 T. R. 174. there was a difference of opinion on the bench, whether an acceptor was allowed the whole of the last day of grace for payment. Buller J. maintained that the bill was dishonoured if he refused payment on a demand made within reasonable hours during the course of that day; and it should seem that he was right.

BILL OF EXCHANGE.—RESTRICTED INDORSEMENT.

LOYD v. SIGOURNEY.

ERROR from the King's Bench into the Exchequer Chamber. The arguments and judgment in the King's Bench have been fully reported before. (b) The case was now argued upon the same grounds by *Patteson* for the plaintiff in error, and *Pollock* for the defendant: whereupon the judgment of the court below was unanimously affirmed.

BEST Ch. J. observing, that no one could read the indorsement without perceiving that its operation was limited, and that the object of the indorsee was, that the proceeds should be applied to his own use. That the words, "to my use," if not so construed, would have no meaning at all; whereas it was the duty of courts of law to put such a construction on the language of an instru-

(b) *Ante*, p. 132.

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ment as would assign to the whole an operation and effect. And he added, that the interests of commerce would not be affected by this decision, for the only result would be, that persons would open their eyes and read before they discounted a bill.

EVIDENCE.— LIABILITY OF PARTNERS.

GUILDHALL, June 17.—Before Lord TENTERDEN Ch. J.

JONES v. JAMES HUNTER, WILLIAM HUNTER, and JOHN CANNON.

Parol evidence held to be inadmissible of the terms of a partnership, of which a rough sketch had been made in writing by one of the partners, and shewn and approved of by another, although it was intended subsequently to extend it into a formal deed, and that had not been done.

Semble, that in an action against three partners, the non-liability of one who had pleaded his bankruptcy and certificate, and as to whom a *nolle prosequi* had been entered, could not be set up as a defence by the others who were liable.

ASSUMPSIT by indorsee against acceptors of two bills of exchange, one for 3000*l.*, the other for 2500*l.* The plaintiff had proceeded to outlawry against *William Hunter*, and *Cannon*, another of the defendants, had pleaded his bankruptcy, whereupon a *nolle prosequi* had been entered as to him.

It appeared that the defendants carried on business in *London* under the firm of *James Hunter jun. and Co.*, *Cannon* having become a partner in *January 1825*, without any alteration being made in the name of the firm. The *Hunters*, both before and subsequently to that period, had been engaged extensively in the *East India* trade; but it was not shewn that *Cannon* had taken any part in that branch of the business. The bills in question were drawn at *Calcutta* in *May 1825*, on account of transactions in the *India* trade, and were accepted by *James Hunter*, in the name of the firm, in the *October* following. The defence was, that the action had been

brought against wrong parties, *Cannon* not being liable on the bills. And *Cannon* was called for the purpose of proving that, by the terms of the partnership, he was to have no share or interest in the *Indian* business, and that even in the *English* branch of the trade, he had nothing to do with dealings antecedent to the time of his becoming partner, as were those out of which these bill transactions arose. Being asked, however, whether the agreement between himself and his partners had been reduced into writing, he said that he had made merely a rough sketch of a short memorandum which he had shewn to *James Hunter*, and which, after some corrections, was mutually approved of; that it was never signed by either of them, as it was afterwards to be extended, and assume the more formal shape of a partnership deed.

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Lord TENTERDEN thought that this instrument must nevertheless be considered as containing the terms of the partnership, both parties having assented to it; and the agreement not being in court, directed a verdict for the plaintiff.

He observed, subsequently, that he doubted very much whether, even if the defendant had been able to prove what he proposed, any other but a person who would be injured by having the liability thrown upon him, could take advantage of such a defence.

The doubt expressed by the learned Chief Justice is entitled to much consideration. The rule of law certainly is, that in a joint action, to include a party not liable is fatal to the plaintiff's claim; and it is equally true, in general, that advantage may be taken of the error by any of the parties sued. But, upon what reasoning does the rule proceed? Upon this:—That the judgment cannot be severed, and that, consequently, execution might be taken out against an innocent

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party. If the reason ceases, so ought the rule, because to allow a person really indebted to defeat an honest claim by a mere technicality, can at least be justified only by necessity. Now in this case the reason does cease, because a *nolle prosequi* having been entered as to the party who was said not to have been liable, he never could have been prejudiced by the plaintiff's recovery against the other. In *Shirreff v. Wilks* (a), (which was a case in some of its circumstances much resembling the present,) the defendant was allowed to set up as an answer the non-liability of one of his partners, who had been sued to outlawry in the action. But there is this material difference. Outlawry is merely to compel an appearance. And the suit against the outlaw is only suspended, not barred. Again, there was in that case fraud on the part of the plaintiffs, for they, knowing that the debt was contracted by two, collusively with one of the partners drew upon the three, and took an acceptance in the name of the three. Now fraud vitiates all transactions, and in this view the right of action was gone altogether.

As to the liability of partners in general on negotiable instruments, see *ante*, p. 112. 118.

 (a) 1 East, 48.

PROMISSORY NOTE.—STAMP.

In the KING'S BENCH.—*Easter* Term.

Moyser and Another, Assignees of SCOTT, *v.* WHITAKER.

A promissory note payable to A. B. or *order on demand*, is within the second class of notes described in the schedule to the stamp act.

THIS was an action of *assumpsit* tried before Mr. Justice Bayley at the last assizes for the county of York, upon a promissory note made by the defendant, for 100*l.*, payable to the testatrix of the bankrupt, Margaret Scott, or

order, on demand. The note, when produced at the trial, was found to have a stamp for 3s. 6d. only.

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Tomlinson, for the defendant, objected, that the stamp was insufficient, contending, on the authority of *Keates v. Whieldon* (*a*), that the note was within the first class specified in the schedule to the stamp-act. (*b*) That at all events it did not belong to the second class, which was confined to notes payable at a time certain, less than two months after the date, or sixty days after sight. (*c*) That so it must fall within either the first or the fourth class (*d*), and in either case the stamp was insufficient.

The learned Judge overruled the objection, but reserved the point; and there being some independent evidence of an acknowledgment of something due, but not ascertaining the amount, he directed the jury to find a verdict for the plaintiff for the amount of the note and interest, giving the defendant's counsel leave to move to reduce the verdict to nominal damages.

Tomlinson now moved accordingly, relying on *Keates v. Whieldon*, and contending that this note was liable to the higher rate of duty. The statute, he argued, had graduated the duty with reference to the time which the note had to run, as well as to the amount; and it was reasonable that, upon a note payable on demand, and

(*a*) 8 B. & C. 7.

(*b*) Headed thus:—"Promissory note for the payment, to the bearer on demand, of any sum of money not exceeding," &c. The necessary stamp under this head would have been 8s. 6d.

(*c*) "Promissory note for the payment in any other manner than to the bearer on demand, but not exceeding two months after date, or sixty days after sight," &c.

(*d*) "Promissory note for the payment to the bearer or otherwise, at any time exceeding two months after date, or sixty days after sight," &c.

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negotiable as this was, having therefore the advantage of circulating for years with all the privileges of a note not due, a higher rate of duty would be imposed. But

The Court, in the absence of Lord Tenterden, refused the rule, saying, that this note was within the second class, as a note payable at a time not exceeding two months after date, or sixty days after sight, for it was payable immediately; and that at all events it was not a note payable to *bearer* on demand.

PARKE J. expressed a doubt whether the case of *Keates v. Whieldon* could be supported.

Rule refused.

In *Keates v. Whieldon* the note did not contain the words, "or order;" but this, it is apprehended, constitutes no essential difference. The authority of that case must, therefore, be considered doubtful.

Precisely the same point arose in the case of *ARMITAGE v. BERRY*, in this term, before the Court of Common Pleas, and was decided the same way.

**POLICY OF INSURANCE.—WARRANTY
TO SAIL.**

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GUILDHALL, March 1.—Before Lord TENTERDEN Ch. J.

NELSON v. SALVADOR.

POLICY of insurance on sugars from *Tobago to London*. **Warranty** to sail on or before the 10th *August*. The only question which arose on the trial was as to the meaning of the word "sail," as applied to the warranty. It appeared from the evidence of the captain, that on the 9th *August* the ship had her clearances for the homeward voyage, and that on the 10th the loading of the cargo was finally completed, and the passengers all on board. The ship was moored with a bower-anchor and a stream anchor, and there was no impediment to her sailing, if the wind had permitted her. The stream anchor was in fact raised on that day; some of the sails also were set, and the vessel moved forward about thirty fathoms. The bower-anchor was not raised owing to a heavy swell which was setting into the bay. Had it been raised the ship must inevitably have been lost. She had, however, no communication with the shore after the morning of the 10th, and on the 11th she was actually under way. Upon this evidence,

Warranty to
sail on or be-
fore a day
certain is not
complied with
by being ready
to sail and
proceeding a
short distance
along the
moorings; nor
is strict per-
formance dis-
pensed with
by an un-
avoidable ne-
cessity pre-
venting it.

Lord TENTERDEN said, In order to comply with this warranty, the ship, which is the subject of it, should be actually on her voyage on the day specified. It can never be considered a sufficient compliance with the warranty, that the ship should be ready for sailing the

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day before. The insurer has a right to insist on strict performance.

Verdict for defendant.

Nothing will excuse the non-compliance with the warranty. (*a*) The plaintiff, therefore, did not urge that he was excused by the pressure of circumstances from sailing on the day specified, but contended that what was done on that day was in fact "a sailing." But it is clear that the expression "to sail," means to enter upon the voyage insured against. The question what is a commencement of the voyage has been construed with less strictness. Thus, a ship which sailed, before the day warranted, to a place *out of the course* of the voyage, for the purpose of joining convoy, and was there detained by an embargo, was held to have sufficiently complied with the warranty. (*b*)

(*a*) *Hore v. Whitmore*, Cowp. 784. Marshall on Insurance, b. 1.
ch. 9. s. 4.

(*b*) *Bond v. Nutt*, Cowp. 601.; and see *Thelluson v. Ferguson*,
Doug. 346, and the note (9).

**POLICY OF INSURANCE—CONCEALMENT
OF MATERIAL FACTS.**

1829.

GUILDFHALL, March 1.—Before Lord TENTERDEN Ch. J.

RICKARDS v. MURDOCK and Another.

ACTION on a policy of insurance on goods by the ship *Cumberland* from *Sidney*, and loading ports in *New South Wales*, to *London*. Pleas, *inter alia*, not sailing on the voyage, and concealment of material facts.

What amounts to a concealment of a material fact, so as to avoid a policy.

The opinion of experienced persons as to what is material, is admissible in evidence.

In the month of April 1827, Mr. *Campbell*, a merchant residing at *Sidney*, shipped on board the *Cumberland*, then about to proceed from that port for *London*, forty-nine casks of *New Zealand* fur seal skins, which, by the bill of lading, were to be delivered to Mr. *A. Emmett*, or, in case of his death, to Messrs. *Rickards, M'Intosh, and Co.* of *London*. Mr. *Emmett* himself took passage by the *Cumberland*, and sailed in her from *Port Jackson* on her voyage to *London*, by way of *Hobart Town* in *Van Dieman's Land*, which latter place she left on the 23d *May*. On the 28th *May* Mr. *Campbell* wrote by the *Australia*, then on the point of sailing from *Sidney* direct to *London*, the following letter to Messrs. *Rickards, M'Intosh and Co.*, in *London*. “In case of the non-arrival of Mr. *Wm. Emmett* per ship *Cumberland*, you will herewith receive,” &c. “I will also thank you to effect insurance at market-price on forty-nine casks, containing 4175 *New Zealand* fur seal skins, shipped to the consignment of Mr. *Wm. Emmett* per *Cumberland*, or in case of death, to your house. The *Cumberland* left *Port Jackson* for *London*, via *Hobart Town*, on the 25th

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April, and by letters received from Mr. *Emmett*, was at *Hobart Town* on the 10th *May*, and was expected to sail from thence in ten or fourteen days from that date. To give every chance to Mr. *Emmett's* arrival in *England*, I have directed my friend Mr. *Harris* not to deliver this until thirty days after the arrival of the *Australia* in *London*." This letter was not addressed, nor transmitted directly to Messrs. *Rickards, M'Intosh, and Co.*, but was sent to Mr. *Harris* inclosed in an envelope, which bore the following address: — "This letter is to be delivered by Mr. *Harris* to Mr. *Emmett* if he has arrived; and if not, to be retained in Mr. *Harris's* possession thirty days from the date he receives it, and then to be delivered to Messrs. *Rickards, M'Intosh, and Co., Bishoptsgate Street, London.*"

The *Australia* sailed from *Sidney* the 2d *June* 1827, (thirty-eight days after the *Cumberland* had left *Port Jackson*,) and arrived in *London* the 6th *October* following. The letter was delivered to Mr. *Harris* on the 8th, and retained by him until the 13th *November*, when the *Cumberland* not having arrived, he delivered it to Messrs. *Rickards and Co.* They, on the same day, sent a clerk to the office of the Indemnity Mutual Marine Assurance Company (the defendants in the present action,) to effect an insurance for 4000*l.* The clerk read at the office that paragraph of the above letter, which begins with, "I will also thank you to effect," and ends with the words, "and was expected to sail from thence in ten or fourteen days from that date." But he read no other part, and gave no further information. He did not shew the letter to the company's agent, nor did he produce the cover directed and indorsed as above described. He said, however, at the trial, that he had no directions from the plaintiff to keep back any part of the letter, which he had open in his hand, and which the company's agent might have read

if he wished, and that his reason for not verbally communicating the facts of the letter having arrived in *England* before, was, that he did not think it material. (a) The company's agent did not make any enquiry of the clerk as to the time when the order for insurance was received, and the policy was effected as for an ordinary risk, and at the ordinary premium. It was also in evidence, that a ship which had sailed from *Sidney* on the 15th of *June* 1827, had arrived in *London* on the 12th *November*, that another had arrived at *Liverpool* from *Sidney* on the 10th *November*; and that the arrival of these vessels had been announced in *Lloyd's* list on the 13th *November*, the day on which the policy on the *Cumberland* was effected, the letters brought by them having been delivered in *London* on the 12th *November*. The *Cumberland* was supposed to have foundered at sea, as she had not been heard of since her departure from *Hobart Town*.

The *Solicitor-General* in addressing the jury for the defendants, contended that the fact of the letter directing the insurance to be made, having been received in *England* thirty-eight days before by a ship which had sailed some time after the *Cumberland* was most material, and ought to have been communicated to the underwriters. That they had reason to believe that the letter had just arrived by one of the recent vessels from *Sidney*. Had they known that the *Australia* had performed the voyage in so disproportionate a time, they might have refused the risk, or at least have demanded a large premium. It was not necessary that there should be fraud in the

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(a) The opinion of the clerk, that the information was immaterial, does not vary the case. The policy is not avoided on the ground of fraud, but because the risk actually incurred is not the risk insured against. See *Shirley v. Wilkinson*, Doug. 306.

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omission to communicate important information. If it proceeded from mistake or negligence, it was still equally fatal to the plaintiff's claim. (a)

The managing director of the *Royal Exchange Assurance* was then called on the part of the defendants; he said that he would not have taken the risk at any premium, with a knowledge that the letter of instructions had been so long kept back. To a question whether the communication of that fact to the underwriter was not material,

Sir James Scarlett objected, that it was not for the witness to say what was a material fact to be communicated.

Lord TENTERDEN. The question should be, whether in his judgment that was a material fact to be communicated; I think I must receive the opinion of skilful persons as to the materiality, not as to what they would have done.

Sir James Scarlett in his reply, argued, that the assured was bound only to communicate the facts of the case, not his own speculations upon those facts. (b) If he tells the underwriter the time when the vessel sailed, the underwriter can calculate the risk as well as the assured. There was no intention in this case to practise a fraud on the underwriter. Whether the *Australia* made a long or a short voyage, the letter was in either case to be kept back. The ship might have been lost,

(a) So laid down by Ld. Mansfield in *Carter v. Boehm*, 3 Burr. 1907. 1 Bl. 594.; and again, in *Ratcliffe v. Shoolbred* at N. P., reported in Marshall on Insurance, b. i. c. 11. s. 2.

(b) *Carter v. Boehm*.

and the news brought within the thirty days. It amounted, therefore, to this, that the assured chose at all events to be his own insurer for thirty days after the arrival of the *Australia*.

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Lord TENTERDEN to the jury. The principle is well known, that if facts materially affecting the risk are not communicated, the assured cannot recover. The letter of instructions, if it had been put into the hands of the underwriters, would have communicated to them that the *Cumberland* was expected to sail from *Hobart Town* about the time when the *Australia* sailed from *Sidney*; and that the latter ship had arrived at least thirty days before. The question, therefore, is, whether it was material that the underwriters should have the opportunity of calculating the chances of the arrival of the one vessel by a reference to the actual arrival of the other, taking into account that the calculation of the probable duration of a voyage is ordinarily made, by simply reckoning the distance of the place — a fact which the underwriters had the means of knowing as well as the assured.

The jury found a verdict for the defendants.

The law on this subject is well understood. If the person effecting the insurance wilfully misrepresent, or fraudulently, or even inadvertently suppress facts, the knowledge of which would influence the calculation of a prudent insurer, the policy is thereby rendered void. In the present case the only question was this:—Every underwriter is presumed to know the distance of places, and the probable duration of a voyage. Now here the underwriters were informed of the period of sailing, and ought, therefore, to have known whether the voyage had exceeded, and how much, if at all, the ordinary time. Then would the fact of the arrival so long before of another vessel which had sailed probably about the

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same time, having given such information, as would have added to the means of knowledge which they possessed before, and varied their calculations of the risk? It was purely a question for the jury, and they were of opinion that it would. Almost all these cases are matters of fact, depending upon the peculiar circumstances of the transaction. They serve nevertheless to furnish analogies, which may be useful for the guidance of mercantile men.

INSURANCE.—BROKER'S LIEN ON THE POLICY.

In the KING'S BENCH.—*Easter Term.*

HUNTER and Others *v.* LEATHLEY.

A broker, who has effected an insurance as the agent of the assured, is bound to produce the policy on the trial of an action on it by the assured, though he have a lien upon it for premiums.

THIS was an action on a policy of insurance. At the trial before Lord Tenterden, at *Guildhall*, February 28, the broker, who effected the insurance as the agent of the plaintiffs, and who was *subpoenaed* to produce the policy, refused, when called into the witness-box, to give up the possession of it, on the ground that he had a lien upon it for premiums to a considerable amount. Lord Tenterden told the witness he was bound to produce the policy, or he would subject himself to an attachment; and ultimately the witness produced the policy, on an assurance from his Lordship that the Court, on his application, would prevent the plaintiffs, if they recovered a verdict, from having the money paid over to them until his lien was discharged. A verdict having passed for the plaintiffs,

F. Pollock, for the defendant, now moved for a rule *nisi* for a new trial, urging as one of the grounds of his

application, that the broker was not bound to produce the policy; and in support of his position cited *Lord v. Wormleighton* (*a*), where Lord *Eldon* ruled, that a solicitor who had been discharged by his client or his representatives, was not bound to produce the papers in his possession for the purposes of the cause, his bill of costs not having been paid.

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LORD TENTERDEN C.J. I entertained no doubt at the trial as to the broker being compellable to produce the policy; and the case cited as determined by Lord *Eldon* does not alter my opinion. There is this difference between the cases: that was an application to the discretionary power of the Court; whereas here the broker was compelled by the writ, which the party has a *right* to sue out. It would be an encouragement to fraud and injustice if we were to hold that a broker, who has effected an insurance, might refuse to produce the policy. Parties then would not know whether they would be able to recover on the policy or not, until the broker was in the witness-box; and he would always have it in his power, by collusion with the underwriter, to defeat the claim of the assured.

LITTLEDALE J. expressed the same opinion, adding, that there was this other objection to a contrary determination; the difficulty, namely, of ascertaining the amount of the broker's lien: that it would be a subject of long discussion at the time of the trial, to examine how much might be due to him on striking a balance.

PARKE J. A lien is nothing more than a right of possession. No broker can refuse to *produce and shew*

(*a*) 1 Jac. Ch. Rep. 580.

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the document on which he has a lien, at the request of the party who delivered it to him. He still keeps the document, and that is all he has a right to.

The rule was refused on this point, but a rule *nisi* was granted on another point.

INSURANCE.—TOTAL LOSS.

In the KING's BENCH.—*Easter* Term.

PARRY v. ABERDEIN.

Insurance on goods, warranted free from particular averages. The ship was laid on her beam-ends by a storm, a small part of her bows only remaining above water; and the crew having abandoned her for the preservation of their lives, she was afterwards towed in the same condi-

tion by fishermen into a neighbouring port, but the goods were so much damaged by the sea-water as to be insufficient to pay the salvage; and the crew were restrained from interfering with the ship or cargo until the claim for salvage was determined. It was also found that there was no other ship in which the goods could have been forwarded to their port of discharge; and that if there had, they would have been of no value there: Held, that the assured, having given due notice of abandonment, were entitled to recover as for a total loss.

ASSUMPSIT on a policy of insurance on goods by the ship *Isabella*, at and from *Trieste* to *Liverpool*, warranted free from average, unless general, or the ship should be stranded. The insurance was declared to be —

£368 on currants, valued at	-	£54 0 per ton.
350 on red Smyrna raisins	- -	3 10 per boll.
182 on black ditto	- - -	1 15 per boll.
40 on figs	- - -	20 0 per ton.

The following memorandum was subsequently written on the policy, and subscribed by the defendant:—“The sum insured on raisins by this policy is declared to be 642*l.* in place of 482*l.*; and the valuations for red

Symrna 3*l.* 18*s.*; and for black 2*l.* 14*s.* per boll." The declaration alleged a total loss by perils of the seas. The defendant, before the commencement of the action, paid his proportion of general average, amounting to 6*l.* 5*s.* 10*d.* per cent.; and having pleaded the general issue, the cause came on for trial before Lord *Tenterden* C. J., *London* sittings after *Trinity* term 1826, when a verdict was found for the plaintiff, damages 15*l.* 17*s.* 8*d.*, subject to the opinion of the Court upon a case, which stated in substance as follows:—

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The defendant subscribed the policy mentioned in the declaration for 200*l.* On the 16th *November* 1828, the ship sailed from *Trieste* for *Liverpool*, with the goods specified in the policy on board. On the following day she encountered a violent storm, which laid her on her beam-ends. Three of the crew were drowned, and the remainder saved themselves by clinging to the foretop. On the 19th they were taken off by some fishermen, and carried into the port of *Ancona*. When they left the ship, the whole of her hull was under water, except a small part of her bows. The master, on his arrival at *Ancona*, hired a boat to look after the ship, and on the 20th proceeded to sea for that purpose. On the 21st they picked up her long-boat, and concluded from that circumstance that she had foundered; but as they were returning towards *Ancona* they saw some fishermen who had fallen in with the ship, and were towing her into that port; at this time she was in the same state as when the crew had abandoned her, a small part of her bows only being above water. In this condition she was towed into *Ancona* on the 22d, and there remained in possession of the salvors, who instituted a claim of salvage in the Tribunal of Commerce of *Ancona*. The cargo was placed by the salvors in the government stores, and the master and crew were not allowed to interfere in any manner with the landing of

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it. It had been entirely under water for eight days, and when landed was found considerably damaged by the sea water. Even after the landing of the cargo, the crew were obliged to live on shore. The ship was delivered to the master in the middle of *April*, and no repairs were allowed to be done upon her till the beginning of that month. She required new masts and rigging, but her hull was not at all injured. She afterwards proceeded on a voyage to *Palermo*, and from thence to *London*. There was no other ship in which the cargo could have been forwarded to *England*; and if, when it was landed at *Ancona*, another ship could have been found, the goods were so much injured by having lain under water, that they would have been of no value at the port of discharge. The cargo, about the middle of *April*, was sold by public auction, (security being given to the salvors,) by the agent of *Lloyd's*, who also acted as agent for the ship; and the following is an account of the sums which the articles insured produced, and the charges upon them:—

The raisins produced	$\text{£}33\ 15\ 9$
Less freight	$57\ 11\ 7$

The figs produced	$0\ 19\ 7$
Less freight	$6\ 18\ 7$

The currants produced	$268\ 6\ 4$
Less freight	$51\ 6\ 6$

$\text{£}216\ 19\ 10$

The salvors, after a hearing and appeal, finally obtained, in *April* 1824, a decree for 1200 dollars and expenses. The assured, residing in *Liverpool*, having heard of the disaster that had befallen the ship, and

before they heard of her being found again and towed into *Ancona*, gave directions for notice of abandonment to be served upon the underwriters. The notice was dated at *Liverpool* on the 11th *December*, and was served on the 13th in *London*, but the underwriters refused to accept it. On the 12th *December* the ship was mentioned in *Lloyd's* list as having been brought into *Ancona* on the 24th *November*. The question for the opinion of the Court was, whether under these circumstances the plaintiff was entitled to recover. If so, the verdict was to stand; if not, a nonsuit was to be entered.

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Campbell for the plaintiff. This is a total loss, and the plaintiff is, therefore, entitled to recover, notwithstanding the average clause; for unless the goods are restored to the assured in such a state that it was better not to abandon, it is a total loss. It is found in the case that there was no ship at *Ancona* by which the cargo could be conveyed to *England*, and that if there had been, it would have been worth nothing when it arrived. Under such circumstances, this was a total loss according to all the cases. *Mitchell v. Edie* (a), *Cologan v. London Assurance*. (b) In the latter case, Lord *Ellenborough* says, “Considering the contract of insurance as a contract of indemnity, it surely cannot be less a total loss because the commodity subsists in *specie*, if it subsist only in the form of a nuisance.” *Thornely v. Hebson* (c) is distinguishable; that was an insurance on ship, and some default might be imputed to the assured in not supplying money to pay the salvage, and so preventing the sale of the ship for that purpose; the ship still remained to them if they paid the salvage. Here no negligence or default of the kind can be im-

(a) 1 T. R. 608.

(b) 5 M. & S. 447.

(c) 2 B. & A. 515.

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puted. *Holdsworth v. Wise* (*a*) is directly in point for the plaintiff.

E. Pollock contra. The underwriters are protected by the average clause, and there was no total loss. Was there any such loss at the time when the crew abandoned the vessel? that is the root of the question. It is not made a total loss merely because the assured wrote a letter of abandonment, the goods at the time existing in specie; for if the goods arrive at the port of destination, though after a long delay, the notice of abandonment will be insufficient to entitle the assured to claim for a total loss. The underwriters do not bargain for short voyages. *Hunt v. Royal Exchange Assurance Company* (*b*), *Anderson v. Wallis*. (*c*) The principle of those cases and of the present is the same, and the assured equally in this as in them had no right to abandon. In *Thompson v. Royal Exchange Assurance Company* (*d*), where the ship was wrecked, and the goods were brought on shore, though in so damaged a state as to be unprofitable to the assured; this was held (there being a warranty against particular average) not to have been a total loss *at the time when the loss happened*, and when the cargo was landed. So here it cannot be said to have been a total loss at the time when the crew deserted the ship, it being then uncertain whether the loss would finally be total or not. The whole loss, such as it was, was one arising from the perishable nature of the cargo. Again, though the vessel was *bonâ fide* abandoned, she might have been aided by a ship going to meet her; and it is no total loss so long as there is a possibility of restoring the property to the assured. The goods might have been

(*a*) 7 B. & C. 794.

(*c*) 2 M. & S. 240.

(*b*) 5 M. & S. 47.

(*d*) 16 East, 214.

forwarded to *England*; a ship might have been forwarded to meet them. *Thompson v. Royal Exchange Assurance Company* is decisive of the present case, though not so strong in all its circumstances. The underwriters have not agreed to indemnify in a case of this sort, but have expressly protected themselves against loss arising from the perishable nature of the cargo. Here all the goods were brought on shore; and if they were not sufficient to pay the salvage and expenses, the underwriters are not on that account alone to suffer.

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Campbell in reply. This was a total loss at the time of the abandonment by the crew. If the vessel had gone to the bottom, and been afterwards weighed up, surely that would have been admitted to be a total loss; and here only a small part of her bows was above water. The case differs in this circumstance from *Thompson v. Royal Exchange Assurance Company*. Moreover, the assured had a right to abandon, the voyage not being worth pursuing, and there being no means of pursuing it. *Wilson v. Royal Exchange Assurance Company* (a), *Manning v. Newnham*. (b)

Cur. adv. vult.

In *Easter* term the judgment of the Court was delivered by

Lord TENTERDEN C.J. After reading the case, he said the Court were clearly of opinion that this was a case of total loss according to all the decisions, and that the abandonment to the underwriters was good.

Judgment for the plaintiff.

(a) 2 Campb. 625.

(b) Ibid. 624. note.

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INSURANCE.—NOTICE OF BLOCKADE.

In the KING's BENCH.—*Trinity* Term.

HARRATT v. WISE and Others.

A policy of insurance on goods to a foreign port, was effected after notice in the London Gazette that that port was in a state of blockade. The ship having sailed before this notice, and been captured, with the goods on board, by the blockading squadron, for an alleged breach of the blockade : Held, that the assured, having given notice of abandonment, might recover on the policy, unless it were shewn that the captain had notice of the blockade in the course of the voyage.

ASSUMPSIT on a valued policy of insurance on goods, by the ship *Ann*, from *Liverpool* to *Buenos Ayres*. The risks insured against were the usual ones, and stated in general terms. The ship sailed from *Liverpool*, on her voyage, on the 4th *February* 1826. On the 18th it was notified in the *London Gazette* that *Buenos Ayres* was blockaded by the *Brazilian* marine; and on the 28th of the same month, the policy in question was effected. Soon after the *Ann* left *Liverpool*, she met with bad weather, and was obliged to put into *Lochindal Harbour*, in the island of *Islay*, to repair the damage she had sustained, and to procure a carpenter for the voyage, the one she had brought from *Liverpool* having been drowned. She remained there nearly three weeks, during which time the captain was on shore most days, and once went to *Greenock*, on which occasion he was absent five days. On the 12th *March* the vessel left *Lochindal*, and proceeded on her voyage. On the 23d *May*, as she neared the outer roads of *Buenos Ayres*, she came in sight of some ships at anchor, which proved to be the *Brazilian* blockading squadron. The *Ann* was then taken possession of by a *Brazilian* officer, on a charge of breach of blockade, and sent in to *Monte Video*, and from thence to *Rio Janeiro*, for adjudication; there she arrived in *July* of the same year. After a detention of more than twelve months, in *August* 1827, she was liberated, but

the cargo remained in the government stores, subject to considerable duties claimed by the *Brazilian* government. Immediately on receiving the news of the capture, the plaintiffs gave the underwriters notice of abandonment, which the latter refused to accept.

At the trial before Lord Tenterden C. J. at *Guildhall*, a verdict passed for the plaintiff. The *Solicitor General* having obtained a rule *nisi* for a nonsuit, on the ground that the policy was illegal, having been effected after notice of the blockade, and in contravention of the law of nations;

The *Attorney General* and *Tomlinson*, in this term, showed cause. The only question is, whether it be contrary to law to effect a policy after notification of the ship's port of destination being blockaded; for it was admitted that the ship *sailed* before the notification could have reached *Liverpool*. And there is nothing in the law to prevent an owner from effecting a policy to protect his vessel against all *illegal* detentions, *after* he hears of a blockade. The policy is *prima facie* legal; it is on legal merchandize; and can only be tainted by illegality in the *voyage*. But the *voyage* was legal in its inception, and continued so until there should be a warning to the captain of the blockade. Now although the ship certainly sailed from *Lochindal* after the notification in the *Gazette*, that is immaterial, unless the underwriters can show that the captain, while there, was informed of the blockade; and there was no evidence whatever of that fact at the trial. But even if the ship had *sailed* after notification of the blockade, the *voyage* was not therefore illegal, nor is the policy, effected under such circumstances, illegal. It does not follow that the vessel would commit a breach of the blockade; she may sail with the intention of proceeding to a blockaded port, the owner at the same time giving his captain

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instructions, in the event of the continuance of the continuance of the blockade, to go into some neighbouring port. In the *Shepherdess* (*a*), Sir William Scott considers that a neutral may fit out a ship and sail for a blockaded port, with a knowledge of the blockade. The general terms in the policy respecting the risks insured against will not affect its legality, for legal risks only can be intended, *Keilner v. Le Mesurier*. (*b*)

Brougham, contra. In the case cited of the *Shepherdess*, Sir W. Scott says, the vessel must not go to the blockaded port to make enquiry as to the continuance of the blockade, but to the adjacent ports of the blockading nation: the relaxation of the law of nations, stated in that case, has that material qualification. The policy in this case, effected after public notification of the blockade, was illegal. Can it be said that, provided a vessel has sailed, the owner may insure her or her cargo, though he have full notification of a blockade of the port of her destination? He would then have an equal right to do so in the case of his vessel's sailing for a port, which after her departure becomes a hostile instead of a friendly one. But at all events, the voyage became illegal, the captain having had notice of the blockade before he left *Lochindal*. He had what amounted in law to complete notice. A notification to the government of a country of a blockade, is a notification to all the subjects under that government. In the case of the *Neptunus* (*c*), Sir W. Scott lays it down, that where the government hears of a blockade, the subject must be taken to know it. The case of the *Adelaide* (*d*) is to the same effect. Much more are the subjects bound by

(*a*) 5 Rob. Adm. Rep. 264. (*b*) 4 East, 396.

(*c*) 2 Rob. Adm. Rep. 110. (*d*) 2 Rob. Adm. Rep. 111. *note.*

the notification to their government, after the government has notified it to *them*. Such a notification fixes them from the time when, according to the ordinary course of communication between the seat of government and the respective parts of the empire, the news would reach any particular place. Here twenty days elapsed between the notification of the blockade in the *Gazette*, and the ship's sailing from *Lochindal*. If, therefore such a notification, which is a proclamation to all the subjects of the realm, that such a voyage is illegal, be of any use, it must be taken to be a communication to the captain, in this case, of the blockade. At all events, it lay on the plaintiff to prove, under such circumstances, that he had no notice.

Cur. adv. vult.

On a subsequent day, the judgment of the Court was delivered by

Lord TENTERDEN C. J. After reading the notes of the evidence at the trial, his Lordship said,—I left it to the jury to say, whether the captain was informed of the blockade at any time between his leaving *Liverpool*, and his falling in with the *Brazilian* squadron; and they were of opinion that he was not informed of it. But it was objected that the policy was void; that having been effected with a knowledge of the blockade, it was contrary to the law of nations, and could not be recovered on; and the cases of the *Shepherdess*, the *Nep-tunus*, and the *Adelaide*, were cited by the defendants as favouring their view of the case. Now here the voyage was not illegal in its commencement; nor do we think that it became so by reason of the ship's having subsequently taken her departure from the harbour of *Lochindal* at a time when the blockade of *Buenos Ayres* had been notified by our government, although sufficient time had elapsed for the intelligence to have reached

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Lochindal before the ship's departure. For although a blockading nation may lay down a general rule as to the time when neutral nations and their subjects shall be bound by a notice given to them, after which period, a ship fitting out for the blockaded port, and taken in an attempt to enter it, is to be deemed guilty of a breach of the blockade; yet such a rule cannot be applied between party and party here. For if distance of time or place were alone decisive of the question of notice, the presumption so drawn might often be contrary to the fact, and much injustice might be done. Whether a party had or had not knowledge of the blockade, is a question of fact for the jury to decide. Sometimes the circumstances will be such, as to raise a strong probability that the party *was* informed of it; in that case, proof will be required from him that he was not. In the present case, however, the jury having decided that the captain had no knowledge in fact of the blockade, and the notice given in the Gazette not being sufficient in law to raise the presumption of such knowledge, the consequence is, that the rule for a new trial must be discharged.

Rule discharged.

GUILDHALL, June 16.—Before Lord TENTERDEN C. J.

WINDER *v.* WISE and Others.

If a ship, having sailed for a blockaded port before public notification of the blockade in this country, receive at any time during her voyage intelligence of the blockade, but nevertheless continue her voyage to the blockaded port, and be captured in an attempt to enter it, a policy of insurance on the ship or her cargo is discharged.

THIS was also an action on a policy of insurance on goods shipped by the vessel mentioned in the last case, the *Ann*, from Liverpool to Buenos Ayres. The evidence

on the part of the plaintiff was of the same nature as in the case of *Harratt v. Wise*, the mate being the only person to speak to what took place from the time of the ship's leaving *Liverpool* till she was carried into *Rio Janeiro* for adjudication. On the part of the defendants there was the additional testimony of three witnesses, who stated distinctly that the blockade of *Buenos Ayres* was well known at *Bowmore*, the seaport town of the island of *Islay*, where the *Ann* lay, and where the captain was frequently on shore, in three or four days after her arrival in that port: and one of the witnesses stated a conversation which he had held with the captain on the subject of the blockade, in reference to which the captain said, "that he would take his chance, and run all risks." The captain was subpœnaed for the plaintiff, but did not appear.

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The *Attorney General*, for the plaintiff, admitted that he could not resist this evidence, and therefore declined to go to the jury upon the facts; but he submitted that still the assured was entitled to recover, on the ground of the voyage having been *bona fide* commenced, and that under such circumstances the ship was not bound to put back to her port of departure when she heard of her port of destination being blockaded; that having sailed before any notification in *England* of the blockade, she had a right to continue her voyage to the blockaded port: and he observed that all nations seemed to adopt this principle, by allowing a certain interval of time for other countries to receive intelligence of a blockade, proportioned to their distance from the place of its announcement; and that there would be no use in fixing any precise period, if the question were still open as to whether, at any period of the voyage, news of the blockade had reached the captain or any of the persons on board.

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Lord TENTERDEN said he did not concur in the view taken by the Attorney General; his opinion being, that if a vessel, at any time during her voyage, learned the existence of a blockade, she could not proceed to the blockaded port. It frequently happened that our government stationed a vessel of war off a port blockaded by a hostile squadron, to warn merchantmen of the blockade, and prevent their going in. That showed that the fixed time allowed for the news to reach neutral countries was not the criterion of the right to enter the blockaded port.

The *Attorney General* elected to be nonsuited.

INSURANCE.—BREACH OF BLOCKADE.—
ABANDONMENT.

In the KING'S BENCH.—*Trinity* Term.

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A policy of insurance on goods to a foreign port, effected after notice in the London Gazette that that port was in a state of blockade, though the ship also sail after such notice, is not illegal, if it be part of the agreement that enquiry shall be made as to the continuance of the blockade.

Where a ship, having insured goods on board, was captured for an alleged breach of blockade, and afterwards rescued by the British crew, who brought her back, with the goods, into an English port, and after receiving information of the capture, but before the return of the ship, and before hearing of the rescue, the assured gave notice of abandonment: Held, they were not entitled to recover on the policy as for a total loss.

Lord Tenterden C. J. at *Guildhall*, sittings after *Trinity* term 1828, the principal questions were, whether there had been a breach of blockade, and whether the plaintiffs could abandon as for a total loss. The facts proved were as follow:—

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On the 18th *February* 1826, it was notified in the *London Gazette*, that the Emperor of *Brazil* had ordered to be instituted a strict blockade of the ports in the river *Plate*, belonging to the government of *Buenos Ayres*. On the 4th *March* following the policy in question was effected at an advanced premium, in consequence of the increased risk. On the 11th *March* the ship *Monarch*, having on board the plaintiff's goods, which were the subject of the policy, sailed from *Liverpool* for *Buenos Ayres* with a knowledge of the blockade having been instituted, but in expectation that it would be raised. On her arrival in the river *Plate* she stood up the river, and when within eight miles of *Monte Video*, on the 22d *May*, was brought up by a shot from a *Brazilian* frigate, the *Piranga*, which was lying at anchor about six miles from *Monte Video*. The *Monarch* then stood towards the frigate, and the captain delivered his papers to a *Brazilian* officer, sent by the admiral to receive them; whereupon the captain was ordered to take his ship into *Monte Video*, where she was detained on the alleged ground that she had sailed from *England* after notification there of the blockade of *Buenos Ayres*. After a month's detention there she was ordered to *Rio Janeiro* for adjudication; and whilst on her voyage the *English* sailors mastered the *Brazilian* crew and put them into the long-boat, retook possession of the ship, and brought her to *Liverpool*, where she arrived on the 20th *September* with her cargo on board, and the captain landed and warehoused the goods. Previously to this, however, in the month of *August*, intelligence having reached *England* of the seizure of the

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ship and cargo, and of her having been ordered to *Rio* for adjudication, (but not of the rescue,) the plaintiffs gave notice of abandonment to the defendant and the other underwriters, which they refused to accept. On the ship's arrival at *Liverpool*, the plaintiffs proposed to the underwriters to reship the goods to *Buenos Ayres*, if that port should be open, or else to *Monte Video*; the underwriters paying the freight and charges, and the expenses already incurred. This also was refused.

Upon this state of facts Sir *James Scarlett* contended at the trial that the plaintiffs must be nonsuited. First, because the voyage insured was illegal; for the blockade of *Buenos Ayres* being known to the plaintiffs at the time of effecting the policy and before the ship sailed, she was navigated against the law of nations, and consequently the policy was discharged. She had a right, it was true, to go into *Monte Video* to enquire about the blockade, and it was the captain's duty to do so if there was any doubt as to the fact of its existence; if he did not, the ship was liable to be seized for a violation of the law of nations. It was evident she was *not* going to *Monte Video* to make such enquiry, for when brought to by the *Piranga*, she had passed the diverging point at which she would have struck off for that port; and there being no intermediate port between it and *Buenos Ayres*, her object must have been to proceed to *Buenos Ayres*, in pursuance of her original intention, and in defiance of the blockade. But if this were doubtful, the subsequent rescue, by which the ship was prevented from going into any of the other ports of *Brazil*, as contemplated by the policy, and obliged to return to *England*, rendered her liable by the law of nations to seizure. Secondly, there was no total loss, either at the time of the abandonment or of the action brought. The plaintiffs suffered nothing, the cargo remained entire in their hands, and their adventure was only retarded.

They should have compelled the owners of the ship to prosecute the voyage; there was nothing to discharge *them*.

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Campbell, for the plaintiffs, admitted, that if before action brought a full and complete restoration had taken place, the assured would have had no right to abandon; and that a mere interruption was not a ground of abandonment. But the present case was one of total loss, properly so called; the adventure was lost, and the voyage totally defeated. *Bainbridge v. Neilson* (*a*), the case most favourable to the defendants, had been doubted by Lord *Eldon* in the House of Lords; but the two cases were materially different,—that being an insurance on ship, this on goods. But, secondly, in order to support the defence set up, evidence should have been given of an *effectual* blockade on the 22d of *May*, when the alleged breach of blockade took place; but there was not even evidence of any *charge* against the ship of a breach of blockade. The *Piranga* must be taken to be in the line of blockade, and the *Monarch* had not reached her when she was fired to and taken possession of. [Lord *Tenterden*. The question of the blockade is for the jury, the others are questions of law.] The policy is dated 6th *March*; the underwriters, therefore, have insured against the blockade.

Lord *TENTERDEN*, having given the defendant leave to move for a nonsuit upon the points of law, told the jury the only question for them was, whether the ship, by proceeding so far as the station of the blockading squadron without enquiring whether the blockade still existed, and whether she might legally proceed, had

(*a*) 10 East, 529.

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committed a breach of the blockade: and intimated his opinion that she had. There was no ascertained distance within which blockading squadrons were bound to confine themselves; and as no port existed between *Monte Video* and *Buenos Ayres*, a blockading ship might legally intercept vessels proceeding beyond or abreast of *Monte Video*. And if *Monte Video* were not in the proper track, it was a violation of the blockade to proceed even so far.

The jury, however, found for the plaintiffs, expressing their opinion that the captain had not endeavoured to break the blockade.

In *Michaelmas* term Sir *James Scarlett* obtained a rule *nisi* for a nonsuit, upon the points raised at the trial: against which, in the present term,

Campbell and *R. Scarlett* showed cause; maintaining, that after the hostile capture, there was a total loss, and a right to abandon; that the abandonment having been made, the subsequent arrival of the goods at *Liverpool* did not affect the right of the assured to recover as for a total loss. The voyage was entirely lost; and it was no satisfaction to the assured to have his goods, which were calculated for the *South American* markets, restored to him at *Liverpool*, where they would find no sale. *Hamilton v. Mendez* (a) was distinguishable, since there the notice of abandonment was not given until after the return of the ship to *England*.

Sir *James Scarlett* (then Attorney Général) in support of the rule, re-urged the argument he had used at the trial, as to the duty of the captain to have gone on to *Rio* for adjudication. If he had, the policy would still

have attached; whereas, by his preferring to rescue his ship, he was prevented from going into any of the adjacent ports, which were contemplated by the very terms of the policy in the event of the continuance of the blockade, and compelled to relinquish his voyage; and the policy was thereby discharged. Secondly, there was no right to abandon as for a total loss; for the vessel had been recaptured at the time when notice of abandonment was given, and the goods were restored before the action was brought. The case of *Bainbridge v. Neilson*, which was directly in favour of the present defendant, was decided on this principle. That was considered a case of only partial loss; there was this difference here, that there was no evidence of the goods being *at all* deteriorated in value. That, however, was not material, as it was admitted that if the Court should decide that this was not a *total* loss, a nonsuit must be entered.

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Cur. adv. vult.

On a subsequent day, the judgment of the Court was delivered by

Lord TENTERDEN C. J., who, after stating the facts of the case, proceeded as follows: — At the trial it was contended for the defendant, that the voyage was illegal, being to a blockaded port after notice of the blockade. It was contended, also, for him, that there was not a total loss, inasmuch as the goods had been brought back to *England*. It was further insisted, that the rescue of the ship was contrary to the law of nations, and that therefore the policy was discharged. The Court are of opinion, that there is no ground for saying that the voyage was illegal in its commencement, for they think with Lord Stowell (*a*), that such voyage is not

(a) Case of the *Shepherdess*, 5 Rob. Adm. Rep. 262.

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illegal, if it be part of the understanding on the agreement, that enquiry shall be made as to the existence of the blockade. In this case, enquiry might have been made of ships on the way, or at any *Brazilian* port; and it appears by the policy, that the possibility of the existence of the blockade was contemplated, for liberty was given to go into other ports in that event. With respect to the rescue, the Court does not feel itself called upon to pronounce an opinion. As to the third point, it does not appear on what grounds the master refused to deliver up the goods at *Liverpool*; but there they were, and it became necessary for the plaintiffs to show that the effect of the abandonment was to enable them to recover as for a total loss. We think that has not been done; and the Court, upon the principle of a former case which was cited at the bar, are of opinion that this was not a total loss. The rule for the nonsuit must therefore be made absolute. The Court, however, must not be understood as giving any opinion as to whether the plaintiffs had a right to have the goods at once, or were bound to pay any thing for them.

Rule absolute for a nonsuit.

There are few subjects connected with mercantile transactions, which have given rise to more litigation than that which is technically called constructive total loss in insurance. The cases which have been decided on this point, have never been properly classified, and are, consequently, involved in some confusion. We shall not, therefore, be unprofitably employed, in endeavouring, very briefly, so to digest them, as to extract from the whole a few plain, intelligible principles.

Few of our readers will need to be told, that the term *constructive total loss*, *i. e.* total loss by construction of law, signifies that the thing insured, though not wholly lost in fact, is yet lost for any beneficial purpose to the owner. It is clear, therefore, that as the thing actually exists *in specie*,

it may, though for the present lost, at some subsequent period again prove available, either in whole or in part, to the owner; and, consequently, as the contract of insurance is but a contract of *indemnity* (*a*), in order to give the assured a right in such case to recover against the underwriter for a total loss, it is necessary that he should relinquish to the latter all his present and future interest in the subject of the insurance. This act is called an *abandonment*, and to make it effectual, three things must concur: first, notice of the abandonment must be given by the assured, with all reasonable dispatch after intelligence of the disaster; secondly, he must, at the time of giving it, have reasonable grounds for supposing the subject of insurance to be altogether lost to him; and, thirdly, that state of things must continue down to the time of bringing the action.

First, As to the notice. No particular form is required; all that is necessary is, that it should be explicit (*b*), unconditional (*c*), and applying to the whole (*d*); but it must be given, as we have said, within a *reasonable time*. What is a reasonable time, seems to be a question rather for the Court, than the jury. (*e*) Three years (*g*), four months (*h*), three weeks (*i*), five days (*k*), after intelligence received, have been successively held to be too late. Notice the day but one after the account of the loss, has been considered sufficient. (*l*) Under peculiar circumstances, also, a further extension may be permitted; where, for instance, until survey, it cannot be ascertained whether it will be prudent to abandon or not. (*m*) If the underwriter act upon the notice, and adopt it, he is thenceforth bound by it, and liable at once for a total loss.

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(*a*) *Hamilton v. Mendes*, 2 Burr. 1210.

(*b*) *Thelluson v. Fletcher*, 1 Esp. N. P. C. 72. *Parmeter v. Todd-hunter*, 1 Campb. 591.

(*c*) *Marsh. Ins. b. 1. ch. 13. s. 3.*

(*d*) *Ibid.*

(*e*) Per Lord Ellenborough in *Anderson v. Roy. Exch.* 7 East, 58. *Kelly v. Walton*, 2 Campb. 155. *Aldridge v. Bell*, 1 Stark. N.P.C. 498.

(*g*) *Mitchell v. Edie*, 1 T. R. 608.

(*h*) *Allwood v. Henekell*, Park, 280.

(*i*) *Anderson v. Roy. Exch.* 7 East, 58.

(*k*) *Hunt v. Roy. Exch.* 5 M. & S. 47. See also *Barker v. Blakes*, 9 East, 283.

(*l*) *Read v. Bonham*, 3 B. & B. 147. diss. Richardson J.

(*m*) *Gernon v. Roy. Exch.* 6 Taunt. 383.

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The second and third requisites will demand a more particular investigation.

A notion seems to have been once entertained, that if at any time there existed such a loss as would justify an abandonment, and due notice were thereupon given, a right was immediately vested in the assured to recover for the whole, which right could not be devested by any subsequent alteration of the state of things. The question arose generally in cases where there had been a hostile capture, and a subsequent recapture or restoration. In *Hamilton v. Mendes*, this doctrine was urged at the bar, but though not judicially determined by the Court, was impliedly denied by Lord Mansfield. His words are, “The plaintiff's demand is for an indemnity; his action, then, must be founded upon the nature of his damnification, as it really is *at the time of the action brought*.^(a) It was afterwards expressly so determined in *Bainbridge v. Neilson* (^b) ; and though doubted by Lord Eldon in *Smith v. Robertson* (^c), it has ever since been considered as established law. (^d) The effect of the abandonment, then, as to the right of the assured, is this:—Without an abandonment, he can in no case recover for a total loss, where it is merely constructive; and with it, his claim is merely conditional, depending on the state of the thing insured at the time when his action is commenced. The question then is this, — Was there such a loss existing before the abandonment, and continuing down to the bringing of the action, as amounts by construction of law to a total loss?

It had been laid down in general terms by the early writers on marine law, that “the assured had a right to abandon in every case, where by the happening of any of the misfortunes or perils insured against, the voyage was lost, or not worth pursuing, and the projected adventure was frustrated; or when the thing insured was so damaged and spoiled, as to be of no value to the owner; or where the salvage was very high; or where what was saved, was of less

(a) 9 Burr. 1210.

(b) 10 East, 309. See also *Godsall v. Boldero*, 9 East, 72.

(c) 2 Dow. 474. See also *Brown v. Smith*, 1 Dow. 349.

(d) *Patterson v. Ritchie*, 4 M. & S. 395.; and see Lord Ellenborough's observations there.

value than the freight; or where further expense was necessary, and the insurer would not undertake, at all events, to pay that expense:” (a) and this doctrine, with all its vagueness and generality, was transferred into the English law of insurance. The absurdities which ensued from not applying the several members of this proposition to their proper subject-matters, will be apparent from a brief review of the cases. To avoid the error which we are condemning, we shall, for distinctness, consider separately the insurance on ship, on freight, and on cargo.

And first, as to the insurance on ship. The earliest case which is material to our purpose, is that of *Goss v. Withers*. (b) That was a policy on ship; a loss by capture, and an abandonment: the vessel was retaken after eight days, but had been so much disabled by bad weather before the capture, as to be unable to proceed on her voyage without putting into port to refit. There was also another policy on the goods; and the state of the cargo, in this, as many other instances afterwards, was improperly taken into account in considering the question as to the ship. It was held in this case, that the assured was entitled to recover for a total loss. The other points in the case we may leave unnoticed, confining our attention to this—whether, at the time of bringing the action, the loss of the ship was total or partial. And Lord *Mansfield's* words are these, “The loss and disability was, in its nature, total at the time it happened.” Granted. “The subsequent recapture is, at best, a saving only of a small part: half the value must be paid for salvage. The disability to pursue the voyage still continued, &c. What could be saved, might not be worth the expense attending it.” Here there is certainly no proof of a total loss of the ship, but Lord *Mansfield* was evidently entangled in the branching proposition which we have noticed above. The case of *Hamilton v. Mendes* (c) followed not long afterwards, in which his Lordship found it necessary to qualify in some degree the very general terms which he had

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(a) Guidon, c. 7. s. 1. quoted by Lord Mansfield, 2 Burr. 1209.

(b) 2 Burr. 683. The elaborate arguments and judgment in this case prove that commercial law was at that time in its infancy.

(c) 2 Burr. 1198.

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made use of in *Goss v. Withers*. That was a valued policy on ship; there had been a capture and recapture, and no material damage sustained; the abandonment was not made till after notice of the recapture, and the plaintiff claimed for a total loss. The Court held it to be an average (*i. e.* a partial) loss. Still Lord *Mansfield*, had not, to use Lord *Ellenborough's* phrase, yet "purified his mind from the generalities" (a) which misled him; for after stating the rule we have cited from the *Guidon*, he says, "In the present case the *voyage was so far from being lost*, that it had only met with a short temporary obstruction; the expense incurred, did not amount to near half the value, &c." (b)

The next case in order of time is that of *Milles v. Fletcher*. (c) The insurance was on ship and freight. The vessel had been captured and recaptured (no abandonment having been made in the interval). Whilst in possession of the enemy, her rigging had been taken away, and she had become leaky. When brought into port, it was found that the expense of repair would exceed the freight. There was also an embargo on the port, which would have prevented her from reaching her place of destination till some months after the time specified. Whereupon the captain, acting *bona fide* for the benefit of the owners, sold her (d), and sailed to *England* with the proceeds. On his arrival the assured offered to abandon, and claimed for a total loss of both ship and freight; and it was adjudged that the insurers were

(a) 2 M. & S. 293.

(b) The case of *Bainbridge v. Neilson*, 10 East, 329. was very similar in its circumstances to this. The only material difference was, that the notice was given *before* intelligence of the recapture. It was held, that there was no total loss (the damage sustained, in fact, being very partial,) and that the claim for indemnity had reference to the state of things at the time of bringing the action. Lord *Ellenborough's* judgment in that case is well worth a perusal. See also *Thelluson v. Shedden*, 2 N. Rep. 230.

(c) Doug. 251.

(d) The captain is not justified in selling the ship, except in case of urgent and extreme necessity. It is too dangerous a power to entrust to his discretion. See the remarks of Sir Wm. Scott in the case of the *Gratitudine*, 5 Rob. Adm. Rep. 240.

liable: Lord *Mansfield's* judgment still proceeding on the erroneous principle, that as the voyage or adventure contemplated was wholly lost, the ship might be considered as lost also! In the case of *Cazalet v. St. Barbe* (a), the jury found the damage sustained to be, no more than 48*l.* per cent., and the Court was therefore precluded from saying that there was a total loss at any time during the voyage. But *Buller J.*, in giving judgment, has the following observation:—"The true way of considering an insurance is this: it is an insurance on the ship *for the voyage*. If either the ship or the voyage be lost, that is a total loss." *Rotch v. Edie* (b) was a policy on ship *and stores*. An embargo was laid on the vessel in her port of sailing, whereupon the assured abandoned and claimed for a total loss. And his claim was held good on the same ground, viz. that the voyage was lost and the adventure frustrated. At length, in the case of *Parsons v. Scott* (c), the good sense of the Court struggled, though with some difficulty, through the fetters of precedent. The ship, having been captured, was ransomed by the master, and brought into port as a cartel ship. The voyage was lost, and due notice of abandonment had been given after the capture, and before intelligence of the liberation. The claim was for a total loss. In the report, Sir *James Mansfield Ch. J.* is made to say what is a contradiction in terms; and if the report be correct, it serves to shew the conflict in his mind between reason and authority. "If a capture," he says, "has occasioned the loss of a voyage, although the ship remain in such a state that she may be repaired, and may again be taken possession of by the owner, yet it is a total loss." And yet afterwards he goes on to say, "If the owner is himself the merchant, he loses *the profits of his voyage*; if not, he loses *his freight*; but how is the ship lost?" And *Lawrence J.* adds, "The dicta in the authorities cited certainly go great lengths; they assert generally, that wherever the voyage insured is defeated by any of the perils insured against, there is a total loss." Then, after a qualification of the rule, he proceeds: "The passage from the *Guidon*, which was the original authority on which Lord *Mansfield* relied in the case of *Goss*

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(a) 1 T. R. 187.

(b) 6 T. R. 415.

(c) 2 Taunt. 363.

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v. *Withers*, does not apply to the ship; and one may conceive very strong cases; as suppose a ship bound for the *Baltic* should be chased into a port and blockaded there till the *Baltic* is frozen: her voyage is lost; but in the ensuing spring she returns to *England* in safety: *how is the ship lost?*" Accordingly, after a second argument, they held that this was but a partial loss, on this plain ground, "The ship has been *detained, but is now safe.*" Four years afterwards, the case of *Falkner v. Ritchie* (a) was decided in the same way in the Court of King's Bench. That was a capture and recapture, by which considerable expense was incurred, and a serious interruption, if not absolute loss, of the voyage occasioned. It was adjudged a partial loss. Lord *Ellenborough* said in the course of his judgment, "As to *Goss v. Withers*, there may be some doubt whether it is similar to the present case; and I must say, that there is a looseness and generality in the expressions which have been borrowed in argument from that and the other case [meaning *Hamilton v. Mendes*], that make one inclined to pause upon them. *What has a loss of the voyage to do with the loss of the ship?*" In *M'Iver v. Henderson* (b), two years after this, Lord *Ellenborough* himself, in delivering his judgment, fell into some of the generalities which he reprobates; and yet the circumstances of that case fully warranted the decision of the Court that the loss was total. There had been a capture; and the loss sustained by the plundering of the vessel, and the expenses of obtaining her release, in all probability exceeded or at least equalled her value. "Under these circumstances," said his Lordship, "what can be said to be the limit of the plaintiff's loss? The *mere restitution of the hull*, if the plaintiff may eventually pay more for it than it is worth, is not a circumstance by which the totality of the loss is reducible to an average one. The voyage is lost [but what had that to do with the ship?] The cargo which was to be conveyed in the ship is wholly gone [but how could that effect the question as to the ship?] She is stripped of a great part of her necessary equipment, stores, and furniture, and the ultimate recovery of any thing is uncertain, and attended with the trouble, hazard, and expense

 (a) 2 M. & S. 290.

(b) 4 M. & S. 576.

of litigation." *Brotherston v. Barber* (*a*), was decided in the same year. It was a case of capture and recapture, abandonment and partial loss sustained. The assured claimed, however, for a total loss. The Court decided on the simple ground that the insurance was a contract of indemnity for losses actually sustained, and that here the loss was partial. Lord *Ellenborough* says, "By notice of abandonment, the assured made an offer which remained executory; in this state of things, considering this as a contract of indemnity, the assured had a right to look to intervening accidents, which might chance to restore them *de integro* to their former situation." His Lordship should have added, "or at least so far reduce the loss, as to change it from a total to a partial one." Abbott J. [Lord *Tenterden*] referred to the early writers, and noticed the uncertainty which prevailed among them as to the doctrine of abandonment. From this period the law upon this point may be considered as settled—and it is this: that where the insurance is on the *ship*, there can never be a total loss, unless at the time of bringing the action the ship is absolutely lost to the owner, as by capture or detention continuing to that time, or is at all events in such a state that the expense of making her available would exceed her value. The only two remaining cases are *Thornely v. Hebson* (*b*), and *Holdsworth v. Wise*. (*c*) In the former of these, the ship insured had sustained such damage from a succession of heavy gales, and became in consequence so leaky, that it was necessary to keep the pumps constantly working, until the crew at last, worn out with fatigue, were compelled to desert her, and were taken on board another vessel, which kept alongside for the purpose of assisting. Eight men, however, of this latter vessel volunteered at the imminent peril of their lives to navigate the deserted ship, and ultimately succeeded in bringing her into port. It was held that here was no total loss, because the ship was not in fact lost to the owners at any given time, the fresh crew having acted for their benefit, and indeed as their agents. In the latter case, the ship having become dangerously leaky, was deserted by the crew as in a hopeless state. The *next day*, however, she was picked up

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(*a*) 5 M. & S. 418. (*b*) 2 B. & A. 513. (*c*) 7 B. & C. 794.

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by another ship and carried into port; but before she reached her port of destination, she was in such a condition (having sustained further damage) that the expense of repair, together with the salvage, would have exceeded her value. It was held (abandonment having been duly made), that there was at one time a total loss, and that it continued total down to the bringing of the action. And the plaintiff accordingly recovered.

2dly, As to insurance on freight. The cases on this subject are neither so numerous nor so discrepant as those which we have just considered. In them the only question has been, Was *any* freight actually earned by the owner, or was the whole entirely lost? The owners seem at one time to have imagined, that if there were an abandonment of the ship on an occasion which justified it, as the freight subsequently earned by the vessel, if any, would be no longer for their benefit, the underwriter on freight would be liable for a total loss. That, however, was otherwise decided in the case of *M'Arthy v. Abei.* (a) It was an action on a policy on freight. An embargo had been laid on the vessel after the risk commenced, and before any freight was earned, whereupon the assured abandoned both the ship (for he had also by a separate policy insured the ship,) and the freight. In about six months afterwards the embargo was taken off; the vessel proceeded home and earned freight on the voyage before the bringing of the action. Lord *Ellenborough's* judgment is as follows: "The question appears to us to resolve itself into this single point, viz. Whether the freight had been in this case lost or not? If the fact be merely looked at, freight in the events which have happened has not been lost, but has been earned by and on behalf of the assured. But if it can be considered as in any other sense lost to the owners of the ship, it has become so, not by means of the perils insured against, but by means of an abandonment, which was the act of the assured themselves, with which, therefore, and the consequences thereof, the underwriters on freight have no concern. (b) The case of *Everth*

(a) 4 East, 388.

(b) The underwriters on the ship, which had been also abandoned, would have a prior claim to freight subsequently earned.

v. Smith (*a*), decided some years afterwards, was almost precisely similar in circumstances. The voyage contemplated had been lost by a detention, and by a subsequent setting in of the frost. After some months, however, the vessel came home, having earned freight. Lord *Ellenborough*, after referring to *M'Arthy v. Abel*, says, "The mere retardation of the adventure, and the consequent inconvenience and expense arising from it, are not a substantive cause of loss, where the *particular thing insured has not received damage*; and whether the freight earned be the particular freight contracted for by the assured, or a posterior freight, makes no difference; if freight has been fully earned, there can be no loss properly demandable of the underwriters." On this subject, therefore, simplified as it is, it is scarcely possible that many questions should henceforth arise.

Lastly, As to the insurance on goods. The question, whether total or partial loss, is frequently a matter of great importance in policies of goods; because in general, where the cargo is of such a nature as to be liable to damage, the underwriters protect themselves against such risks by expressly limiting their responsibility to cases of total loss. It is scarcely necessary to say, that such is the effect of the words in the policy, "free of average, unless general," as in *Parry v. Aberdein*. We will lay down what we conceive to be the result of the cases, and will then proceed to justify our position by a hasty review of them. It seems then, that if the goods insured, or any part of them, exist at the time of abandonment and of bringing the action, so as to be, after all necessary deductions, of any value, however trifling, to the owner, the underwriter will be discharged. The wreck of the vessel, the mere retardation, or even loss, of the voyage, are not *in themselves* sufficient to constitute a total loss. Much will depend on the nature of the cargo, as whether perishable or not; on the means of transport, and on the conduct of the parties interested. It seems, in short, in most cases, to resolve itself into a question of *fact*, whether, taking into account all the circumstances, there remained any thing which could fairly be considered as valuable to the owner. In *Cocking v. Fraser* (*b*), Lord *Mansfield* is

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reported to have said, "If the commodity specifically remain, the underwriter is discharged." A proposition much too general, and on that account dissented from by Lord *Kenyon* in *Burnett v. Kensington*. (a) Lord *Ellenborough*, also, in allusion to that dictum, observed, "It cannot, surely, be less a total loss because the commodity subsists in specie, if it subsist only in the form of a nuisance." (b) Indeed, it is probable that it was either an unguarded expression, too hastily caught up by the reporter, or that the reporter himself was mistaken. For Lord *Mansfield* does not seem to have followed any such rule in his own decisions. On the contrary, he considered the circumstances mentioned in *Goss v. Withers* as authorising the assured to recover for a total loss, not only on the ship but on the cargo. And yet there it not only remained in specie, but was in possession of the owners at the time of bringing the action. So in *Manning v. Newnham* (c), there was a policy on ship, freight, and cargo; and the principal question was, whether there was a total loss of the latter. It appeared, that the vessel was so much injured that she could not be repaired; and there were no means of sending on the cargo: whereupon it was taken out uninjured, and sold for a sum nearly equalling the amount at which it was valued in the policy. The jury nevertheless found a total loss; and after argument, Lord *Mansfield* said, "We all agree that the jury have done right. If the voyage in contemplation is lost, or is not worth pursuing, this is a total loss." Lord *Mansfield*, therefore, could not suppose that the mere existence of the thing insured saved the underwriter; his error seems to have been of the opposite kind. In *Dyson v. Rowcroft* (d) that notion was put to the test. It was a policy on fruit, with the usual memorandum. In the course of the voyage, the fruit was so much damaged by the sea-water, that it became rotten and stunk, and on the ship's arrival at an intermediate port, into which she was driven, the landing of the cargo was prohibited. The ship, being unable to proceed, was sold, and the cargo thereupon thrown overboard. It was said that the cargo subsisted at the time of the arrival, and that the subsequent throwing overboard, being the

(a) 7 T. R. 210.

(c) 2 Campb. 624. n.

(b) 5 M. & S. 455.

(d) 3 Bos. & Pul. 474.

act of the master, and not a consequence of the perils of the sea, could not vary the case. But the Court, impeaching the *dictum* in *Cocking v. Fraser*, held this to be clearly a total loss. And, indeed, there can be no doubt that the mere existence of the commodity in a worthless state does not prevent the right of the assured from attaching. It is a much more difficult question, what amounts to a total loss, when the goods remain in such a condition that they may be ultimately productive. In *Goss v. Withers*, the loss of the voyage was a principal ingredient in the judgment. *Manning v. Newnham* was decided on that ground alone; and it was a point strongly urged, that there was no vessel at the place by which the cargo could be forwarded. The same ground was taken in *Anderson v. The Royal Exchange* (a), and apparently acquiesced in by the Court, though the judgment ultimately proceeded on the delay in abandoning. In *Barker v. Blakes* (b) the loss was in fact partial, unless the frustration of the voyage could be considered as creating a total loss. And the Court, in giving judgment, expressly decided that this was a sufficient cause of abandonment. Lord *Ellenborough's* words are, "In order to entitle himself to recover as for a total loss, the plaintiff must establish two things:—First, that a *loss of the voyage* (the only description of loss which can be contended for in this case, as the goods themselves have been ordered to be restored, and are capable of being so) was occasioned by the detention; and, secondly, that the abandonment was made in due time. And we think that the impossibility of prosecuting the voyage to the place of destination, which arose during and in consequence of the prolonged detention of the ship and cargo, may be properly considered a loss of voyage; and such loss of voyage, upon received principles of insurance law, is a total loss of the goods which were to have been transported in the course of such voyage." The next case in order of time is that of *Wilson v. The Royal Exchange* (c), before Lord *Ellenborough* at Nisi Prius. The case of *Manning v. Newnham* having been cited, his Lordship said, "I accede to that case; and if it shall be proved that the voyage here was not worth pursuing, and that there

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(a) 7 East, 38.

(b) 9 East, 285.

(c) 2 Campb. 623.

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were no means of pursuing it, I think this must be considered a total and not an average loss." It appeared, however, that although the ship was so much shattered as to be unable to continue the voyage, there was a brig lying near the port, in which the wheat (which was the subject of the policy, and had been a good deal damaged) might have been sent on. And his Lordship consequently held, that the claim for a total loss could not be sustained. It is somewhat singular, that in a case (*a*) which occurred about a year afterwards, no notice was taken either in the argument or the judgment of this "settled principle of insurance law," that a loss of the voyage is a total loss of the goods insured. That was a policy on tobacco and sugar, (perishable commodities,) with the average clause. The ship was wrecked before her voyage began; but the goods were got on shore, though in a very damaged and unprofitable state. The vessel was afterwards broken up. Immediate notice of abandonment was given. Here certainly the contemplated voyage was lost; yet Lord *Ellenborough* nonsuited; and on motion the Court refused a rule to set the nonsuit aside, his Lordship saying, "All the goods were got on shore and saved, though in a damaged state. If this can be converted into a total loss by a notice of abandonment, the clause excepting underwriters from particular average may as well be struck out of the policy. We can only look to the time when the loss happened and the goods were landed, and then it was not a total loss, however unprofitable they might afterwards be." The last sentence of this judgment seems to have been somewhat hastily given, for supposing the goods to turn out utterly worthless, in consequence of the damage sustained, before the commencement of the action, surely this would be a total loss. *Anderson v. Wallis* (*b*), in the following year, was a case which received more consideration. It was a policy on *copper and iron*, free of average. The ship sustained so much damage at sea that she was compelled to put into an intermediate port for the purpose of refitting; and in consequence of that delay was too late to prosecute her voyage that season. There was no other ship in which the cargo could have been

(*a*) *Thompson v. The Royal Exchange*, 16 East, 214.
(*b*) 2 M. & S. 240.

forwarded from the port at which the vessel put in, and the assured thereupon abandoned. It was urged, that the voyage being lost, the assured were entitled, after due abandonment, to recover for a total loss. And Lord *Ellenborough*, in delivering the judgment of the Court, so far from contradicting that position, expressly admits it; but he makes a distinction between a loss and a retardation of the voyage. "What case," he says, "has ever yet decided that such a temporary retardation is a good cause of abandonment, so as to amount to a total loss? Disappointment of arrival is a new head of abandonment in insurance law. I am well aware that an insurance upon a cargo for a particular voyage contemplates that the voyage shall be performed with that cargo, and any risk which renders the cargo permanently lost to the assured may be a good cause of abandonment. In like manner the loss of cargo may be effected not merely by the destruction of that cargo, but by a total permanent incapacity of the ship to perform the voyage. That is a destruction of the contemplated adventure. But the case of an interruption of the voyage does not warrant the assured in totally disengaging himself from the adventure, and throwing this burden on the underwriters." It will be observed, that in this case the cargo was not of a perishable nature, and had in fact sustained little damage. In *Glennie v. The London Assurance* (*a*) this point did not arise; for the ship had actually arrived at her destined port with the cargo, and although it was much damaged, the goods were still worth something. The case of *Hunt v. The Royal Exchange* (*b*) went much farther than that of *Anderson v. Wallis*, though it was decided professedly on the same ground, and was supposed to resemble it in its circumstances. It was a policy on goods, consisting of pork and flour, the latter free of average, from *Cork to Newfoundland*. Soon after she left the former place, the ship became so disabled from tempestuous weather, that she was obliged to put back into *Cork*; and there, a survey having been held, was pronounced not worth repairing, and subsequently broken up. Part of the cargo had been thrown overboard to lighten her in the storm, the rest was ware-

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(*a*) 2 M. & S. 371.

(*b*) 5 M. & S. 47.

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housed; there were no means of forwarding it, and it was afterwards sold by public auction. Notice of abandonment having been given, the assured claimed for a total loss. Now here, beyond all question, the voyage was lost; the very case supposed by Lord *Ellenborough* in his judgment in *Anderson v. Wallis* actually occurred. There was “a permanent incapacity of the ship to perform the voyage;” there was “a destruction of the contemplated adventure:” yet this was held not to be a total loss. Lord *Ellenborough* founds his judgment on this: — that there was a *retardation* only of the adventure, for the cargo might have been forwarded by the next spring. He adds, “If, indeed, the cargo had been of a *perishable nature*, this would have been a case not of retardation only, but of destruction of the things insured.” And Mr. Justice *Bayley*, in an elaborate judgment, observes, “On reference to the language of this policy, it is difficult to infer that the assured were to be entitled to abandon, on the ground of a mere loss of voyage. There are cases, certainly, which speak of a loss of voyage as a ground of abandonment; and such cases may be conceived. For instance, if a ship were so damaged, as to be obliged to land her cargo at an unfrequented place, where there was no opportunity of disposing of the cargo, and the ship owners could not procure another vessel to forward it, except at an expense exceeding the value of the goods; such a case, I think, might warrant an abandonment, and throw the loss on the underwriter. But there is a great difference between the case just put, and this case, where goods are safely warehoused in an undamaged state, and where there is nothing but a disappointment of voyage to constitute a ground of abandonment.” Lastly, in the case of *Cologan v. The London Assurance* (a), which was decided in the same year, the Court insisted strongly on the circumstance of the loss of voyage, though the facts were such as rendered it scarcely necessary to advert to that point at all. There were, clearly, circumstances authorising the abandonment; and, at the time of bringing the action, there was every probability that no part of the goods insured would ever produce any thing to the owner. Lord *Ellenborough*, how-

ever, says, "A total loss occurred in the first instance; and while the assured had no reason to believe that events had changed the nature of this loss, they abandoned. Now where there has been a total loss and an abandonment, we must look to the situation of things before action brought, in order to ascertain whether the assured has since been restored to his rights, so as to do away the effect of the abandonment. In the present case, there has not been any restitution, considering it with reference to *the main purpose of prosecuting the voyage insured.*" And Mr. Justice Bayley says, "The object of the policy is to insure against the risk of failure, by reason of the perils mentioned in the policy; that is, in the present instance, *that the cargo should reach the port of destination.*" — There is certainly some difficulty in extracting from these various and occasionally almost inconsistent decisions, any intelligible principle. Is the policy, as Mr. Justice Bayley says, a guarantee that the cargo shall reach the port of destination? If so, then certainly the absolute defeating of that voyage will amount to a total loss. And the question will be, When may the voyage be considered as lost? Not, it seems, by the destruction of the contemplated adventure for the time being. If the goods can be sent on, even at some distant period, and are not likely to sustain material injury by the delay, then the voyage is not lost, and there is no ground for abandonment. But, with great deference, we would venture to submit, that the policy is a contract of indemnity, in case of loss of the thing insured by perils of the sea in the course of a certain specified voyage; and the only question, therefore, as it seems to us, is this: whether (supposing the underwriters to have protected themselves against an average loss) there has been such a loss of the goods, arising out of those perils, as rendered them utterly worthless to the owners at the time when the action was brought. We apprehend that the two cases in the text, viz., *Parry v. Aberdein*, and *Naylor v. Taylor*, may be tried by this test, and that the decisions will be justified by it.

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ACT OF BANKRUPTCY.

In the KING'S BENCH.—*Hilary Term.**COTTON v. JAMES.*

A builder being in embarrassed circumstances, caused to be removed from some unfinished houses which he had contracted to build, window sashes and other building materials, and placed them in the keeping of a friend: Held, no act of bankruptcy, the words, "transfer or delivery," in the statute, meaning such a transfer as *passes the property.*

TRESPASS for breaking and entering plaintiff's dwelling-house, and taking and carrying away his goods. The defendant pleaded, first, the general issue; second, the bankruptcy of the plaintiff. The plaintiff disputed the commission, and at the trial before Lord *Tenterden*, *Middlesex* sittings after *Michaelmas* term, the defendant having, in his Lordship's opinion, failed in proving a valid act of bankruptcy, a verdict passed for the plaintiff.

F. Pollock now moved for a new trial, on the ground of misdirection by the learned Judge on this point. The act of bankruptcy contended for was founded on that clause of the 6 G. 4. c. 16. s. 3. which enacts, that if any trader shall make or cause to be made any fraudulent gift, delivery, or transfer of any of his goods or chattels, with intent to defeat or delay his creditors, he shall be deemed to have thereby committed an act of bankruptcy. The evidence to support the commission was, that the plaintiff being a surveyor and builder, and in embarrassed circumstances, had in *October 1828* caused to be removed from some unfinished houses which he was then under a contract to build, some sashes and sash-frames, and building materials, to the value of about 800*l.*, and placed them in the keeping of a friend of his. This was a fraudulent delivery of his

goods to another, with intent to delay or defeat the claims of his creditors, and the evidence of such intent ought to have been left to the jury. [Lord Tenterden C. J. Then you must also contend, that if goods are secretly removed to defeat a judgment creditor, that would be an act of bankruptcy.] If goods are removed in order to pay one creditor in preference to the rest, that would be an act of bankruptcy; *a fortiori*, if they are removed in order that none may be paid.

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Lord TENTERDEN C. J. If any thing like this could be an act of bankruptcy, still you must show it to be the act of the party himself. But even if it had been shown to be his act, my clear opinion is, that it is no act of bankruptcy within the meaning of the statute.

BAYLEY J. concurred.

LITTLEDALE J. The words "transfer or delivery," mean by way of security to some one, so that the bankrupt *ceases to have a property in the goods*.

PARKE J. I agree with my brother *Littledale*; the words "transfer or delivery," are coupled with the words "conveyance of goods," &c. and must mean *where the property is parted with*.

Rule for a new trial refused on this point, but granted on the ground of excessive damages, on which also it was moved.

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**PAYMENT TO BANKRUPT, WHEN
PROTECTED.**

In the KING's BENCH.—*Hilary Term.*

**HILL and Another, Assignees of HOLMES, a Bankrupt,
v. FARRELL.**

A. bought of B., a hop-merchant, a library of books, and paid him the price. B. had previously committed an act of bankruptcy, of which A. had no knowledge, and on which a commission issued within two months of the transaction: Held, that this payment was protected by the 6 G. 4. c. 16. s. 82. (a), and that the assignee of B. could not recover back the books, at least without tendering the price.

TROVER for a parcel of books, laid in the first count as the property of the bankrupt, in the second as that of the plaintiffs, as assignees. Plea, the general issue. The cause was tried before Lord *Tenterden C. J.* at *Guildhall*, sittings in *Michaelmas term 1827*, when a verdict was found for the plaintiffs for 1000*l.*, subject to the opinion of the Court upon a case, the substance of which is comprised in the following deposition made by the defendant on oath before the commissioners of bankrupt, which was read at the trial as part of the plaintiff's evidence:—

(a) Which enacts, that all payments really and bona fide made, or which shall hereafter be made, by any bankrupt, or by any person on his behalf, before the date and issuing of the commission against such bankrupt, to any creditor of such bankrupt (such payment not being a fraudulent preference of such creditor), shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and all payments really and bona fide made, or which shall hereafter be made, to any bankrupt, before the date and issuing of the commission against such bankrupt, shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and such creditor shall not be liable to refund the same to the assignees of such bankrupt: provided the persons so dealing with the said bankrupt had not, at the time of such payment by or to such bankrupt, notice of any act of bankruptcy by such bankrupt committed.

"On the 24th *July* 1826 (*a*), I purchased some books from the bankrupt. I was introduced to him by Mr. *Watson*; I never before had any dealings with him. When I made the purchase I received an invoice or list of the books, and I paid for them the same day by a cheque on Messrs. *Child* and Co. Mr. *Watson* knew that I was desirous of purchasing a library of books, and about the middle of *July* 1826 he addressed a letter to me, informing me that he knew where I could make a purchase, and that he would introduce me to the party who wished to dispose of the books. On the 17th *July* I accompanied him to *Holmes's* house, in *Fenchurch Street*, where I saw Mr. *Holmes's* books, and then had a list of them given to me. I considered of the purchase during the week, and the following *Monday* I concluded it. The books were removed in a day or two. At the time I made the purchase I understood Mr. *Holmes* carried on business as a hop-merchant; I had no reason to believe he was a bookseller. I did not know at the time that he was in embarrassed circumstances; I had not heard that he had stopped payment."

Previously to the commencement of the action, the plaintiffs, as assignees, demanded the books in question of the defendant, but he refused to deliver them up.

The question for the opinion of the Court was, whether or not the plaintiffs, as assignees, were entitled to recover. If the Court should be of opinion that they were, then the verdict should stand, the damages being reduced to the nominal sum of 1*s.* on the defendant's delivering up all the books: but if the Court should be of opinion that the plaintiffs were not entitled to recover, a nonsuit was to be entered.

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(*a*) The bankrupt had committed an act of bankruptcy in the month of *June* preceding, on which a commission issued on the 9th of *August*.

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Comyn for the plaintiffs. The property in these books vested in the plaintiffs, as assignees, by relation, from the commission of the act of bankruptcy, and they are entitled to recover them. The transaction between the defendant and the bankrupt was a *contract of sale*, not a *payment* made to the bankrupt in discharge of an antecedent debt; for the defendant must have paid the money before he could have called on the bankrupt for the delivery of the books, and till such delivery there could be no debt. It could not even be considered as a *contract* in the ordinary course of trade, as in *Cash v. Young* (*a*), for here the bankrupt was a hop-merchant. *Bishop v. Crawshay* (*b*), and *Sauderson v. Gregg* (*c*), (in the latter of which Lord Tenterden C. J. expressly determined that the 1 Jac. 1. c. 15. s. 14. on which also *Cash v. Young* was decided, applied to payments only, and not to sales,) govern the present case. And the eighty-first section (*d*) of the 6 G. 4. c. 16. is decisive of the plaintiff's right to recover; for it gives validity to contracts made with a bankrupt, without notice of an act of bankruptcy, in those cases only where the transaction took place more than two months before the

(*a*) 2 B. & C. 413. (*b*) 3 B. & C. 415. (*c*) 3 Stark. 72.

(*d*) The eighty-first section enacts, that all conveyances by, and all contracts and other dealings and transactions by and with, any bankrupt bona fide made and entered into more than two calendar months before the date and issuing of the commission against him, and all executions and attachments against the lands and tenements, or goods and chattels, of such bankrupt, bona fide executed or levied more than two calendar months before the issuing of such commission, shall be valid, notwithstanding any prior act of bankruptcy by him committed, provided the person or persons so dealing with such bankrupt, or at whose suit, or on whose account, such execution or attachment shall have issued, had not at the time of such conveyance, contract, dealing, or transaction, or at the time of executing or levying such execution or attachment, notice of any prior act of bankruptcy by him committed.

issuing of the commission; whereas the present contract was within the two months.

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E. Lawes Serjt. for the defendant. This was a payment to the bankrupt within the meaning of the 6 G. 4. c. 16. s. 82. *Cash v. Young* is directly in point for the defendant. In *Saunderson v. Gregg*, it was not shewn that the payment was made *bonâ fide*. *Bishop v. Crawshay* was decided on the 1 Jac. 1. c. 15. s. 14., which makes valid only payments made by a debtor of the bankrupt (*a*); but in the eighty-second section of the present statute, which is substituted for the other, the word "debtor" is not found, and seems to have been omitted purposely, in order to include all *bonâ fide* payments made without notice of an act of bankruptcy, and to avoid the technical construction put upon the word as found in the statute of *James*.

Cur. adv. vult.

In this term, Lord TENTERDEN C. J. delivered the judgment of the Court. After stating the facts, he said:—The defendant's counsel in their argument relied on this as a *bonâ fide payment* to the bankrupt, made without notice of an act of bankruptcy committed by him, and therefore within the protection of the eighty-second section of the statute. The plaintiffs, on the other hand, contented themselves with relying on this being a *sale* of goods made by one who had no property in them, having been made after he had committed an act of bankruptcy, and within two months before the issuing of the commission; and, therefore, that the de-

(*a*) The 1 Jac. 1. c. 15. s. 14. had declared, that no *debtor* of the bankrupt should be thereby endangered for the payment of his or her debt truly and *bonâ fide* to any such bankrupt, before such time as he should understand or know that he was become bankrupt.

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fendant could not retain them. And in support of this view of the case, the opinion given by me at Nisi Prius in *Saunderson v. Gregg*, which was decided on the 1 Jac. 1. c. 15., was cited. But that was only an opinion delivered at Nisi Prius without argument; and acquiesced in, perhaps, from a doubt whether the transaction between the parties would be found, on examination, to be a *bonâ fide* one or not. The defendant rested his case on the eighty-second section of the present bankrupt act, and cited the case of *Cash v. Young* as a decision by the whole Court in his favour. And though, in the present case, the goods bought were not, as in *Cash v. Young*, goods in which the bankrupt dealt in the course of his trade, the bankrupt here being a hop-merchant, and the goods sold being books, yet the books having been sold *bonâ fide*, and the defendant having paid for them, we think the rule of law and the construction of the act of parliament ought to be the same in both cases; and that, therefore, the defendant is entitled to retain the goods, at least until his money be returned him. If the assignees, under such circumstances, were to offer to repay the money, and demand to have the goods returned, that might raise another question for the decision of the Court; but upon that we give no opinion, nor is it, indeed, a question very likely to arise where there is a *bonâ fide* sale. As it is, the postea must be delivered to the defendant, and a nonsuit entered.

Judgment of nonsuit.

It has been held in two cases in the Common Pleas, *Churchill v. Crease* (a), and *Terrington v. Hargreaves* (b),

(a) 5 Bing. 180.

(b) Ibid. 489.

that the provision of the eighty-second section has a retrospective operation, and applies to commissions which issued *before* the 6 G. 4. c. 16. This construction of the clause was made upon the effect of the words "payments *made*," coupled with the words "*hereafter to be made*."

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BANKRUPTCY.—DEBTS PROVEABLE UNDER THE COMMISSION.

In the KING'S BENCH.—*Hilary* Term.

BOORMAN *v.* NASH.

ASSUMPSIT to recover damages for a breach of contract, in not accepting and paying for twenty-five tons of linseed oil: there were also counts for goods bargained and sold. Pleas: first, the general issue; secondly, a general plea of bankruptcy. At the trial before Lord Tenterden C. J., London sittings after *Trinity* term 1827, a verdict was found for the plaintiff, subject to the opinion of the Court upon the following case:—

The plaintiff is a seed-crusher, doing business under the firm of *T. H. Boorman* and Co., and the defendant was a partner in the bank of *Hollick* and Co., Cambridge, and also carried on business on his own account in the oil trade. On the 7th November 1825, the plaintiff and defendant entered into a contract in writing, duly signed by an authorised agent of both parties, of which the following is a copy:—

"London, 7th November 1825. Bought this day, by order of *Thomas Nash*, of *T. H. Boorman* and Co., 25 tons linseed oil at 24*l.* 5*s.* per ton, usual allowances, to be free delivered, half in the month of *February*, and the remainder in the month of *March* next, and paid

A. contracted to purchase a certain quantity of oil, at a certain price, to be delivered on a certain day. Before that day arrived, he became bankrupt, and obtained his certificate: Held, that the seller might, nevertheless, sue him for not accepting and paying for the oil; and that the measure of damages was the difference between the price contracted for and the market price on the day the contract was broken by the non-acceptance of the oil.

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for from each delivery in ready money, allowing $2\frac{1}{2}$ per cent. discount. Half the above to be delivered in the last fourteen days in *February*, and the other half in the last fourteen days in *March* next.

“Stephen Cleasby, Broker.”

On the 28th of *February* 1826, twelve and a half tons of oil, being one half of the linseed oil mentioned in the contract, were duly tendered by the plaintiff to the defendant, and payment demanded for the same, and discount offered to be allowed at $2\frac{1}{2}$ per cent., but the defendant would not receive and pay for it. On the 31st *March* a like quantity of oil was duly tendered, payment demanded, and discount offered as before, but the defendant refused to accept and pay for the same. On the same 31st *March*, the plaintiff caused a notice in writing to be served on the defendant, that in consequence of his not having cleared and paid for the twenty-five tons of linseed oil according to contract, the same would be resold, and the defendant held liable to all difference in price, charges, interest of money, and every other expense that might arise in consequence of the non-fulfilment of the contract. And the entire quantity of linseed oil was resold on different days in *April*, at 17*l.* 10*s.* per ton, of which notice was given to the defendant; that being a fair market price at the time of such resales. Shortly after the resales were completed, on or about the 29th *April* 1826, an invoice and account of the sales was rendered by the plaintiff's agent to the defendant, by which it appeared that a loss had occurred on the resales of 170*l.* 3*s.* 2*d.* A commission of bankrupt was, on the 7th *January* 1826, awarded and issued against the defendant, together with *Ebenezer Hollick* and others his partners, under which they were duly found and declared bankrupts, and the defendant has since obtained his certificate. On the 7th *January* 1826,

the oil might have been sold in the market for 21*l.* 10*s.* per ton.

The question for the opinion of the Court was, Whether the bankruptcy and certificate of the defendant were a bar to the plaintiff's recovering in this action; and if not, what was the proper measure of the damages which the plaintiff was entitled to recover?

Alderson for the plaintiff. The plaintiff is entitled to recover for the breach of this contract, and the defendant's bankruptcy and certificate constitute no answer, unless it can be shown either that this was a debt proveable under the commission as the law stood before the passing of the present bankrupt act, 6 G. 4. c. 16., or that it became so by the fifty-sixth section of that act. The rule before the present act was, that when the Court or the commissioners could, without the intervention of a jury, ascertain the amount to be recovered of a demand resting in damages, it might be proved under the commission, *Utterson v. Vernon.* (a) Here the day on which the contract was to be completed had not arrived when the commission issued; and as the commissioners could not ascertain whether the market might rise or fall in the interval, they could not have fixed the amount of the damage which might ultimately be sustained. Then, the 6 G. 4. c. 16. s. 56. has made no alteration in the law as regards the present claim; for this is not a sum ascertainable in amount but payable on a contingency, which is the case provided for by that section. It could not be ascertained by computation, nor could the commissioners put a value upon it. It was not, when the defendant became bankrupt, a contingent debt, capable of proof. In

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(a) 3 T. R. 544.

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Atwood v. Partridge (a) that was held of a right to sue in covenant for unliquidated damages. For suppose the market had risen, no debt at all would perhaps appear; at all events, it would not be distinctly ascertainable whether any debt would be due until the time arrived for the delivery of the goods. Secondly, as to the measure of damages, that is to be ascertained by the difference between the contract price and that which goods of a similar description and quality bore on or about the day when the oil ought to have been accepted, *Gainsford v. Carroll* (b), *Mainwaring v. Brandon*. (c) And the general averment of damage in the declaration is sufficient, for it is not necessary to set forth special damage which may be reasonably supposed to arise from the breach of contract stated in the declaration.

Follett for the defendant. The policy and principle of all the bankrupt acts is to discharge and make a free man of the bankrupt after his certificate; and the certificate is a bar to this action. The contract set out in the declaration is of goods bargained and sold: it is a contract for the purchase of a specific quantity of oil at a certain price. Nothing further remained to be done by the seller except the delivery. The plaintiff might have had an action for goods bargained and sold, and the price of the goods, though payable at a future day, might have been proved under the commission; and if so, the claim is barred by the certificate, as well for the consequential damages as for the price. The fifty-first section of the 6 G. 4. makes debts due at a future day proveable under the commission; and here, by the contract, the property in the oil passed to the defendant, and his assignees might

(a) 4 Bing. 209. (b) 2 B. & C. 624. (c) 8 Taunt. 202.

have maintained trover for it, *Hanson v. Meyer* (*a*), *Simmons v. Smith* (*b*), *Rohde v. Thwaites* (*c*): the price, therefore, was a debt due from the bankrupt at the time of the bankruptcy, payable at the times specified, or on the plaintiff's offer to deliver the oil. The only question, then, arising on the fifty-sixth section of the act is this: was the intervention of a jury necessary to estimate the amount of the damages? Certainly not; for the only claim which the plaintiff had against the defendant was for the specific price of the oil, for which he might have proved under the commission; and if he had his election to prove for the principal debt, then, according to the rule laid down in *Van Sandau v. Corsbie* (*d*), he cannot maintain his action for contingent damages, which are in the nature of accessories to the principal debt. The contingency on which the debt arises occurred, as provided for in the fifty-sixth section, after the bankruptcy. The plaintiff might have put in his claim as for a sum to be ascertained at the end of *February*. Further, the certificate *may* bar debts which are not even proveable under the commission. Here, for instance, may not the certificate operate as a release to the bankrupt from all contracts not executed at the time of the bankruptcy? [Lord Tenterden. Can we say that the bankruptcy rescinds the contract. How could it be known that the bankrupt might not still have performed it?] The point, however, on which the defendant mainly relies is, that the full amount for which the bankrupt could be liable might have been ascertained at the end of *February*; and if so, the certificate is a bar. Lastly, as to the sufficiency of the averment of damage, the law will not imply a fall in the market, or that the seller resold at a loss. It does, indeed, imply damages which

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(*a*) 6 East, 614.
 (*c*) 6 B. & C. 588.

(*b*) 5 B. & C. 857.
 (*d*) 3 B. & A. 15.

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necessarily arise from the breach of contract; but no other. And in this case the special damage arose from the plaintiff's own negligence; for if he had given notice of the contract to the assignees, the claim might have been arranged, perhaps allowed to be proved under the commission.

Alderson in reply. There was no *debt* which could have been proved at the time when the commission issued. The plaintiff's claim is altogether one of damages; and of such damages as necessarily arise out of the non-acceptance of the goods according to the contract. The word "ascertain" in the statute means "ascertain by computation;" for it was not intended to put the commissioners into the place of a jury, and require them to examine witnesses.

Cur. adv. vult.

Lord TENTERDEN C. J. now delivered the judgment of the Court; and, after stating the facts, said, — We think the bankruptcy of the defendant was not a legal answer to the breach of contract complained of in the declaration. At the time when the commission issued, it was uncertain not only what would be the amount of damage, but whether any damage would ultimately be sustained; and the claim was not therefore proveable under the commission. Unless, therefore, it can be shewn that bankruptcy wholly puts an end to a contract of this description on both sides, it can be no answer to an action by the vendor. Now it is clear that the bankruptcy did not wholly rescind the contract, because the assignees might have insisted on the performance of it on the part of the vendor, and no doubt would have done so if they had considered it a beneficial contract. There was then in this case a subsisting contract, and no breach of it before the bankruptcy: there were no

damages that could be ascertained and proved as a debt at the time of the issuing of the commission; and, therefore, it did not fall within either of the provisions of the bankrupt act referred to by the counsel for the defendant. With respect to the measure of damages, the Court think that the difference between the market price at the time of the contract and at the day on which the goods were to have been accepted, was the proper criterion. There must, therefore, be judgment for the plaintiff for that amount. And as the damage necessarily resulted from the defendant's breach of contract, it may be recovered under the general allegation of damage in the declaration.

Judgment for the plaintiff.

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BANKRUPTCY.—VALIDITY OF COMMISSION.

In the KING'S BENCH.—*Trinity* Term.

SURTEES and Others, Assignees of MARCHINGTON, v.
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THIS was an action against the sheriff for taking in execution the goods of the bankrupt. There was a verdict for 2000*l.*; and *Brougham* in *Michaelmas* term 1828 moved to enter a nonsuit, on the ground of the invalidity of the commission, or to deduct from the amount of the damages a sum of 953*l.* paid by the defendant out of the proceeds of the levy, on account of rent and taxes. As to the first point; the bankrupt had ceased to be a trader in 1821. The commission was dated the 1st *October* 1827, and the new bankrupt act, on which it was founded, and by which all the former statutes relating

issued after the passing of the new bankrupt act, 6 G. 4. c. 16., cannot be supported by a trading which had ceased before the commencement of that act.

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to bankrupts were repealed, came into operation on the 1st *September* 1825. It was contended, therefore, on the authority of *Maggs v. Hunt* (*a*), that the commission could not be supported on this trading.

As to the second point; it was urged, that even if the seizure were not justifiable, yet the payment of the rent and taxes would be protected; and for this *Buckley v. Taylor* (*b*) was cited. In *Lee v. Lopes* (*c*), also, it was not denied that there might be a distress of property, even in the hands of the assignees, though it was certainly doubted whether that case fell within the provisions of the 8 Anne, c. 14. s. 1. [*Bayley J.* While the goods remain on the premises, the landlord may seize (*d*); and where the landlord applies to the sheriff, it may be considered as equivalent to a distress. (*e*)]

The rule was granted in the alternative, as asked; and the Court having, after argument in this term, decided that the commission could not be supported on a trading, which had ceased before the passing of the act, it became unnecessary to determine the second point.

 In the KING'S BENCH.—*Trinity* Term.

HUGHSON v. HURD.

THE question in this case was upon the sufficiency of the act of bankruptcy. The act relied upon was, that the bankrupt had procured his goods to be taken in execution, with intent to defeat or delay his creditors. This was created an act of bankruptcy by the 5 G. 4.

(*a*) 4 Bing. 212. (*b*) 2 T. R. 600. (*c*) 15 East, 230.

(*d*) See *Ex parte Plummer*, *Ex parte Jacques*, and *Ex parte Dillon*, 1 Atk. 103.

(*e*) Sed qu., see *Lee v. Lopes*, ubi sup., and *Ex parte Devisme*, Co. B. L. 190.

c. 98. That statute, however, was repealed by the 6 G. 4. c. 16. which, as to that particular, took effect immediately, viz. on the 2d *May* 1825. In other respects its operation was postponed till the 1st *September* following, and for this interval, therefore, the old statutes were revived by the repeal of the repealing statute of 5 G. 4. c. 98. The bankrupt had given a warrant of attorney, on which judgment was entered up and the goods seized on the 18th *August* 1825, which, it will be seen, was within the interval we have mentioned. The Court held, after argument, that the commission could not be supported, the bankrupt having committed no act prohibited by any statute at that time in force.

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In the KING'S BENCH.

Ex parte BROWNHILL.

THE question in this case was upon the sufficiency of the trading. Here, however, not only had the trading ceased before the passing of the new act, as in *Surtees v. Ellison*, but the trade itself, that of a coach proprietor, had only been brought within the operation of the bankrupt law by the 5 G. 4. c. 98. repealed, as we have seen, by the 6 G. 4. c. 16. There was, therefore, nothing to give jurisdiction to the commission, and it was held that it could not be supported.

We have thought it unnecessary to give these cases more in detail, because it is scarcely probable that the question will again arise. The consequences of the strange oversight in the framing of the new act, to which they are attributable, will very shortly have passed away.

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**PRINCIPAL AND AGENT.—LIABILITY OF
PRINCIPAL TO SELLER.**

In the KING'S BENCH.—*Hilary* Term.

THOMSON v. DAVENPORT and Others.

Where a party sells goods to another, and debits him with the price, knowing that he is buying as an agent, but not knowing the principal's name, the seller may afterwards resort to the principal for the price, provided the state of account between the principal and agent be not thereby varied to the prejudice of the latter. And the seller is not bound to enquire who is the principal.

EROR upon a judgment obtained in the borough court of *Liverpool* against the plaintiff in error. The original action was for the price of goods sold. One *Thomas M'Kune*, a *Scotch* agent at *Liverpool*, had bought a quantity of glass and earthenware from *Davenport* and Co. (the plaintiffs below), not, however, on his own account, but on commission for *Thomson* (the defendant below), who lived at *Dumfries*. In the invoice *Davenport* and Co. had debited *M'Kune*, and he having given them credit in his books for the amount, had entered the sum, together with 2 per cent. commission, to the debit of *Thomson*. Before the credit had expired, *M'Kune* became insolvent, no payment having been made to him by *Thomson* on account of the goods. At the trial, *M'Kune* was called as a witness, and the effect of his evidence appears by the summing up of the recorder, who told the jury, that there was some uncertainty as to the exact words made use of by *M'Kune* when he gave the order for the goods; but it appeared to him upon the whole, that the name of the defendant (*Thomson*), as principal, was not as that time made known to the plaintiffs (*Davenport* and Co.); and he directed them, that if they were of opinion that the defendant's name as principal was mentioned at that time, or that the plaintiffs knew in any other way that *he* was the prin-

cipal, their verdict ought to be for the defendant; but if they thought that the plaintiffs did not know, and so had not the opportunity of electing whether they would take him or *M'Kune* for their debtor, they ought to find for the plaintiffs; adding, that in his opinion it was immaterial whether they knew that *M'Kune* was not buying on his own account or did not know it, if the name of the principal were not communicated to them. Whereupon the jury found a verdict for the plaintiffs. To this direction of the learned recorder a bill of exceptions was tendered, on the ground that he ought to have told the jury, that if they were satisfied the plaintiffs knew that *M'Kune* was dealing merely as agent, then, even though the name of his principal was not disclosed, the plaintiffs, by debiting *M'Kune* in the invoices, had elected him for their debtor, and could not afterwards resort to the principal. And upon this ground the case was now argued by

Joy for the plaintiff in error. There were, he said, two well known propositions of law, as relating to principal and agent. The first, that where the seller, knowing that the purchaser is the agent of another, and dealing with him on that footing, yet elects to take the agent for his debtor, he cannot afterwards revert to the principal; the second, that where the seller deals with the buyer in ignorance that he is the agent of another in the purchase, he may, in general, have recourse to the principal when known. Now this case, he contended, though perhaps an intermediate one, fell within the principle of the first of these two rules. The sellers knew that *M'Kune* was dealing as broker; they knew that he was buying for a *Scotch* house; they knew, in fact, all but the *name* of the principal, and *that* they might have ascertained in a moment, had they chosen to ask the question. But they did not ask it; they

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debited *M'Kune* with the price, they made out the invoice to him; they did not wish or choose, in fact, to know any one in the transaction but him. What was this but an election to take him for their debtor, and a manifest intimation that they should hold him, and him only, responsible for the price? Again, was it not reasonable that they should prefer for their debtor, *M'Kune*, a man resident in and well known at *Liverpool*, with whom they had themselves had previous dealings, to a *Scotch* house of which they knew nothing, and from which they might have a difficulty in recovering the price on account of the difference of process? In this respect, the defendant might be considered as a foreigner, and so the case would even more closely resemble those of *Patterson v. Gandasequi* (*a*) and *Addison v. Gandasequi*. (*b*)

Patteson for the defendant in error, argued that, admitting the propositions as laid down, there was in this case no election on the part of the sellers to take the broker ultimately for their debtor. An election, he said, implied a comparison; and here there could be no comparison, because the principal was unknown. It was said the plaintiffs might have known by enquiring; but they were not bound to enquire, and it would be a new doctrine to hold, that they had by this precluded themselves from resorting to the principal, when it became necessary or desirable for them to ascertain who he was. If, indeed, the broker sustained any prejudice by the suing of the principal, that might have raised a different question; but here the credit had not expired, and no payment had been made on account of the purchase by the principal to the broker. He cited *Moore*

(*a*) 15 East, 62.

(*b*) 4 Taunt 574.

v. *Clementson* (*a*), for the purpose of shewing that the principal is considered as primarily interested in the transaction, whatever may be the conduct of the agent, and *Railton v. Hodgson* (*b*) as an authority, that even if the seller had given credit to the broker, he might, nevertheless, maintain an action for the price against the principal, who had actually had the goods.

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Joy in reply, urged, that when the seller had been informed of every particular except the name of the person on whose account the purchase was made, and notwithstanding had made his choice, it would be most unjust if he should be allowed to wait until the person to whom the credit had been given became insolvent, and then turn round upon the principal. How could the principal, if such a rule were to prevail, protect himself against loss?

Lord TENTERDEN C. J. I am of opinion that the direction of the learned Recorder was right, and that the verdict must stand. The general rule is, that if a person sells goods to another, on the supposition that he is dealing with him as a principal, and subsequently discovers that that person is but the agent of another, (the state of account between the agent and his principal not having been varied in the meantime so as to prejudice the latter,) he may resort to the principal for payment, even though he has previously debited the agent. On the other hand, if at the time of the sale the seller knows that the person dealing is not the principal, and knows *who the principal* is, yet selects the agent for his debtor, then, according to the cases of *Patterson v. Gandasequi* and *Addison v. Gandasequi*, he cannot afterwards have recourse to the principal. The present is a middle case.

(*a*) 2 Campb. 22.

(*b*) Cited in *Patterson v. Gandasequi*.

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The plaintiffs below were informed that the purchaser was buying for another. They might, indeed, have made enquiry, but, in fact, they did not know the principal. It seems to me, therefore, that the case falls within the first proposition. There may be another exception, and it is this: where a *British* merchant is buying for a foreigner, it is universally understood among commercial men, that credit is given to the *English* seller. Here the principal lived at *Glasgow*; and it might have been a fair question, whether, by the usage at *Liverpool*, the credit must not be supposed to have been given to the *English* dealer. But that point was not raised, and no such evidence was given. The ground taken was this, that the plaintiff had elected to take the broker as his debtor, because he knew that there *was* a principal, though he was ignorant of his name: and that ground fails.

BAYLEY J., after stating generally the law, in substance as Lord Tenterden had laid it down, added, There is no authority which says that the seller may not look to the principal when known, though at the time of dealing he may know that the dealer is merely the agent. The justice of the case is, that where a man has had the benefit of the goods, he should pay either the seller or the estate of the insolvent. Now the evidence in this case is, that he has not paid for them to the insolvent; and where then is the hardship of requiring him to pay the seller?

LITTLEDALE J. took the same view of the case.

PARKE J. having been concerned in the cause, gave no opinion.

Judgment affirmed.

In the two cases of *Patterson v. Gandasequi* and *Addison v. Gandasequi*, the principal himself, though not personally known to the seller, was present at the sale, and assisted in the selection of the articles. From this and the other circumstances which appeared in evidence in the latter of those cases, such as the fact that the principal was a stranger to the seller and a foreigner, the broker, on the other hand, well-known and a customer, the jury thought themselves warranted in finding that the credit had been given by deliberate preference to the broker, and the Court confirmed that verdict. Nor is it improbable that in this case, if the question had been left generally to the jury, and they had found that *Davenport* and Co. had *elected* to take *M'Kune* for their debtor, the Court (supposing that the question could have been brought before them) would not have felt themselves called upon to disturb the verdict. It would perhaps, indeed, have been better if the learned Recorder had left the whole matter to the jury, with such observations on the legal effect of the evidence as might have suggested themselves; because, though it is sometimes difficult accurately to define the boundary between the province of the judge and that of the jury, yet upon the whole, questions such as this seem rather to belong to the latter; for who so fit to determine a question depending mainly on mercantile usage as twelve men selected from a mercantile community? The Court could not take all the facts of this case as ingredients of their judgment, because there is this disadvantage in a bill of exceptions, that it confines itself to a single issue; and the issue here raised was, Whether the Recorder had correctly stated the law.

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ADMISSIBILITY OF UNSTAMPED AGREEMENT.

In the KING'S BENCH.—*Hilary* Term.

VINCENT v. COLES.

The plaintiff entered into a written agreement, unstamped, to do certain repairs in the defendant's house on specified terms. During the progress of the work the original plan was departed from, and additional work was done, not provided for by the written agreement : Held, that the plaintiff could not sue for the value even of such additional work without producing the agreement, and that, it being unstamped, he could not use it to show that that work was not intended in it.

ASSUMPSIT for work and labour, and materials supplied by the plaintiff to the defendant, Plea, the general issue. At the trial before Lord Tenterden, *Middlesex* sittings after *Michaelmas* term, it appeared that the plaintiff and defendant had entered into a written agreement, whereby the plaintiff contracted to do considerable repairs and alterations in the defendant's house, upon terms therein specified. The parties had not adhered to the original plan, and further repairs and alterations were found necessary during the progress of the work, and were executed accordingly. On the production of the written agreement, at the instance of the defendant's counsel, it was found to be without a stamp ; whereupon it was contended that the plaintiff must be nonsuited. *Gurney*, for the plaintiff, maintained that he might still recover for that portion of the work which was not included in the written agreement. The learned Chief Justice, however, was of opinion that he could not, and directed a nonsuit.

Gurney now moved for a new trial, urging that, under the circumstances, it was not incumbent on him to support his case by the production of the written agreement, but for the defendant to do so if he relied upon it ; that more than one half of the plaintiff's claim was for work which became necessary and arose out of cir-

cumstances which occurred subsequently to the written contract; that as to this portion, the employment of the plaintiff was independent of, and a departure from, the original agreement. And he relied on the case of *R. v. Pendleton* (a) as an authority to show that the Court might have looked at the agreement, though unstamped, for the purpose of ascertaining how far its stipulations extended.

Per Curiam. The action being brought for work connected with that which by the plaintiff's own evidence was the subject of a written agreement, the plaintiff was bound to produce it; and not being stamped, it could not be received in evidence. To admit it would be highly inconvenient; for if such an instrument were to be held receivable under such circumstances, the judge at the trial would be occupied in examining the written contract every moment that any item was given in evidence, to see whether it was included in the agreement or not.

Rule refused.

(a) 15 East, 450.

The case of *R. v. Pendleton* does not judicially decide the point. It was unnecessary, indeed, to consider that question in order to the conclusion which was there arrived at. An *obiter dictum* of Bayley J. seems to have furnished the argument. He says, "Though we cannot look at the instrument for the purpose of proving by it any agreement between the parties; for such is the general import of the stamp-acts; yet the Court may look at it to see whether it applies to other evidence of a contract between them. As if a contract in writing be made, not stamped, for the sale and delivery of certain goods on certain terms, the Court, in

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an action for the non-delivery of the goods, upon a contract proved by parol evidence only, may look at the instrument to see whether it applies to the goods then sought to be recovered; and if those goods were not included in the contract, parol evidence may be received of the contract sought to be recovered upon." There is a distinction between the case supposed and the present case; of which, though exceedingly fine, the Court seems to have availed itself. In the present case, the subject-matter of the transaction is substantially *one*; in the case put by Mr. Justice *Bayley* the transactions are supposed to be different. Yet it is difficult, perhaps, to see how this can affect the principle. The plaintiff did not seek to enforce the agreement. For his breach of the revenue laws in not stamping the instrument, he suffered sufficiently by being shut out from that part of his claim to which it related. He tendered it merely for a collateral purpose. (a) In answer to an objection proceeding from the other side, that the agreement having been reduced into writing no parol evidence could be received — he offered the written agreement itself, to shew that it did not apply to the subject before the Court. The inconvenience of referring to such instruments may be very great; but we may perhaps be pardoned for suggesting that the inconvenience would hardly of itself justify the extension of a rule at best sufficiently severe. (b)

(a) See *Reed v. Deere*, 7 B. & C. 261.

(b) Whilst the above observations were in the press, a case occurred before Lord *Tenterden* at Nisi Prius, (*READ v. BARBER*, sittings at *Westminster*, 11th *December* 1829,) in which his Lordship permitted the plaintiff to recover for extras, although the work had been commenced under a written contract, which, when produced, was found to be unstamped. The above case of *Vincent v. Coles* was not cited; but his Lordship observed, that he had seen much injustice resulting from the exclusion of parol evidence under such circumstances.

**ADMISSIBILITY OF UNSTAMPED
INSTRUMENT.**

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In the KING'S BENCH.—*Hilary Term.*

SWEETING v. HULSE.

DRAYER against acceptor of a bill of exchange for 15*l.*, dated 25th *March* 1826, payable to the plaintiff or order two months after date. At the trial before Lord *Tenterden C.J.*, *London* sittings after *Easter term* 1828, it appeared that the defendant had persuaded the plaintiff, who was an illiterate person, to sell out a sum of 150*l.* new four per cents., and to lend him the sum of 15*l.*, which it produced. To secure this money he gave the plaintiff the bill in question. When it became due he agreed to renew it for six months, and the defendant's son (a boy of fourteen) accordingly drew on the back of the bill an unstamped instrument to the following effect: "Six months after date pay to my order 15*l.* stocks, for value received." The plaintiff signed it as drawer, and the defendant as acceptor; and the defendant's son then struck out the name of the defendant on the original bill. It was objected for the defendant, that, on the authority of *Reed v. Deere* (*a*), the original security having been cancelled with the plaintiff's assent, he was bound to resort to the second instrument; and that being unstamped, he was precluded from recovering. On the other side it was said, that the plaintiff being an illiterate person, ignorant of the objection arising from the want of a stamp, and the

A jury cannot be permitted to look at an unstamped instrument, in order to assist them in drawing a conclusion of fact.

(a) 7 B. & C. 261.

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second instrument having been drawn by the defendant's son, the plaintiff could not, under the circumstances, be presumed to have waived all objection to its substitution for the former; and that as the substituted instrument turned out to be unavailable as a security, the old one continued in force, and might be recovered on; for the law would not suppose him to have intended to take an unavailable security in lieu of a valid one. *Roe v. Archbishop of York.* (a) Lord Tenterden, observing that the latter question was one of law, directed the jury to find for the defendant, if they thought the cancellation of the first bill and substitution of the un-stamped one were with the plaintiff's assent; and the un-stamped instrument was submitted to their inspection to assist them in coming to their decision. A verdict was found for the defendant, leave being reserved to the plaintiff to move to enter a verdict for the amount of the bill.

A rule *nisi* having been obtained, in *Trinity* term, to enter a verdict for the plaintiff, or for a new trial, on the ground that the jury had drawn an erroneous conclusion,

Campbell and *Chitty* now showed cause. There was ample evidence that the cancellation and substitution of the un-stamped bill were with the plaintiff's assent; he was bound, therefore, to resort to the un-stamped instrument. *Reed v. Deere* is directly in point. There there was a second agreement varying the first, the first only being stamped; and the plaintiff having declared on both, and also, in separate counts, upon each, it was held that the second might be looked at to ascertain whether the first was varied by it, and that the plaintiff

(a) 6 East, 86.

could not exclude it, and go upon the counts which set out the stamped agreement only.

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Sir J. Scarlett and Barstow contra. The substituted instrument was invalid because it had no stamp, and because it was given not for money, but stocks. And as it, therefore, could not be made available, the original security remained in full force. *Roe v. Archbishop of York, Wilson v. Vysan.* (a) Then, the unstamped instrument ought not to have been submitted to the jury to decide upon.

Lord TENTERDEN C. J. In *Reed v. Deere* the Court looked at the unstamped instrument to see whether it differed from the stamped one. Here, the *jury* were permitted to look at the unstamped instrument, and to take it into their consideration in determining the question as to the plaintiff's assent to its substitution. They were, therefore, allowed to draw a conclusion of fact from an invalid instrument, which by law they cannot do. On this ground I think there ought to be a new trial.

The other Judges concurred, Parke J., however, observing that there was evidence of the plaintiff's assent independently of his execution of the unstamped instrument, and that he thought the verdict ought to be the same.

Rule for a new trial absolute.

(a) 2 Taunt. 288.

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LIABILITY OF LOAN-CONTRACTORS.

In the KING'S BENCH.—*Easter Term.*

ROTHSCHILD v. HENNINGS.

(In Error.)

R., a loan-contractor, delivered to L. certain scrip receipts, purporting that L. had paid him 10 per cent. deposit on a certain amount of *Neapolitan* stock, and entitling the bearer to certificates for that amount of stock, on his paying the balance on a day specified. L. transferred these receipts to H. for a valuable consideration. R., by public advertisement, afterwards offered, on certain conditions, an extended time for payment of the balance, and required that the receipts should be left at his office, to be inarked as held under the new conditions. The receipts transferred by L. to H. were accordingly left by him at R.'s office, and there indorsed by R. with the name of H. H. having failed to comply with the conditions on which the time was extended: Held, on error, that he could not recover the deposit of 10 per cent. from R. in an action for money had and received.

THIS was a writ of error from the judgment of the Court of Common Pleas. The original action was by *Henning*s against *Rothschild*, for money had and received, on the other money counts, and on an account stated. Plea, the general issue. At the trial a verdict was found for the plaintiff below for 1235*l.* 1*s.* 9*d.*, subject to the opinion of the Court upon a case, which was afterwards turned into a special verdict, and was in substance as follows:—

On the 14th *October* 1822, *Rothschild* made and signed six receipts, in the words and figures following:—

“ *Neapolitan* loan, by *N. M. Rothschild*, contracted by *C. M. de Rothschild*. ”

“ *Neapolitan* 5 per cent. certificates, No. 433, with interest from the 1st *July* 1822.

“ Received 137*l.* 4*s.* 8*d.* being 10 per cent. on ducats 500, *Neapolitan* rentes; on payment of the balance on or before 1st *February* 1823, with 4 per cent. interest thereon from the 15th *October* 1822, the bearer will be

comply with the conditions on which the time was extended: Held, on error, that he could not recover the deposit of 10 per cent. from R. in an action for money had and received.

entitled to certificates for that amount of stock, with interest coupons from the 1st *July* 1822. 1829.

	<i>£.</i>	<i>s.</i>	<i>d.</i>	<i>v.</i>	<i>HENNINGS.</i>
“ Ducats 500, rentes at 80 per cent; exchange, fr. 4.40 per ducat, and fr.					
25.65 per £. sterling	-	-	-	1372	6 5
“ 10 per cent. deposit	-	-	-	137	4 8
“ Balance to pay 1st <i>February</i> 1823, with 4 per cent. interest, from 15th <i>October</i> 1822	-	-	-	1235	1 9

“ Entered, *C. H. Thiel*,

“ *J. S. Thompson*.

“ *London, 14th October 1822.*

“ *N. M. Rothschild.*”

(The others were in the same form.)

Upon these several receipts *Rothschild*, on the 14th of *October* 1822, received from one *Lowe* the sum of 1235*l. 1s. 9d.* and delivered the receipts to *Lowe*.

The receipts came into the possession of *Hennings* in the following manner. *Hennings* had advanced 1600*l.* to *Lowe* on the 2d *November* 1822, on the credit of these receipts, on which day they were delivered by him to *Hennings*; and on the 3d *December* 1822 the account was settled by *Hennings* taking the receipts in part payment, at the rate of 7½ per cent. and *Hennings* thereupon became the holder of such receipts for his own benefit, and still is the holder and bearer thereof.

On the 14th and 15th *January* 1823, *Rothschild* caused the following notice and advertisement to be inserted in the *Times* newspaper, of which *Hennings* then had notice.

“ *Neapolitan Loan of 1822.*

“ *Mr. N. M. Rothschild* begs to notify to the holders of the deposit receipts of this loan, that the parties may

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either pay them in full on 1st *February* next, according to agreement, or that this period may be extended at their option, on the condition of a further payment of 10 per cent. on the stock being made on the 1st *February*, with the interest due on the receipts up to that day; 20 per cent. on ditto, on the 1st *March* next; 20 per cent. on ditto, on the 15th *April* next; 10 per cent. on ditto, on the 15th *May* next; and the remainder on the 15th *July* next; with interest at the rate of 4 per cent. from the 1st *February*, payable as these amounts become due. At the time the foregoing payments are made, the parties will be allowed to receive bonds equivalent to the amount paid, or as nearly as the case will admit. Those persons who intend availing themselves of the extension here granted, are desired to leave their receipts at Mr. *Rothschild's* counting-house, any day between the 20th and 25th instant; in order that the same may be duly marked, and other receipts prepared for delivery on the 1st *February*.

“ *New Court, London, 11th January 1823.*”

In consequence of the above advertisement, *Hennings* caused the following note to be sent to *Rothschild*, which he received :—

“ *N. M. Rothschild, Esq.* “ *21st January 1823.*”

“ Sir, — I beg leave to hand you, enclosed, six ten per cent. scrip certificates of the *Neapolitan* loan, amounting, as per specification at foot, to 4500 ducats rentes, on the capital of which, (12,350*l.* 17*s.* 6*d.*) I wish to avail myself of your offer to pay on the 1st of *February* 10 per cent. only, and I request, therefore, that you will have the goodness to cause the certificates to be prepared to that effect.

“ *C. F. Hennings.*”

The said six several receipts were left at *Rothschild's* counting-house on the same 21st of *January*, in order

to get them marked; and they were, on the following day, respectively marked by his clerk, and by his authority, pursuant to the notice and advertisement of the 11th of *January*, with the following words thereon, “4500 ducats, per *C. F. Hennings*;” and were re-delivered so marked to *Hennings*.

The following advertisement was inserted by *Rothschild* in the *Times* newspaper on the 24th of *January 1823*;—

“*Neapolitan Loan of 1822.*

“At the request of several of the holders of the *Neapolitan* scrip receipts, a further extension for the payment of the balances will be granted by *N. M. Rothschild*, as follows:—5 per cent. to be paid on the 1st of *February* next, with interest due on the receipts up to that day;—

5 per cent. on the 1st of *March* next, with interest at
 10 per cent. — 15th of *April* — } 4 per cent. from
 10 per cent. — 15th of *May* — } the 1st *February*,
 10 per cent. — 15th of *June* — } payable as these
 10 per cent. — 15th of *July* — } amounts become
 and the balance on the 15th of *August*. due.

“The parties who intend availing themselves of this arrangement, will leave their receipts at Mr. *Rothschild's* counting-house, as pointed out in his advertisement of the 11th inst., in order that new scrip receipts of corresponding amounts may be prepared for delivery on the 1st of *February* next.

“*New Court, London, 23d January 1823.*”

And the following advertisement was inserted in the said newspaper on the 5th of *February 1823*:—

“*Neapolitan Loan of 1822.*

“Many of the holders of *Neapolitan* deposit receipts having failed to comply with the tenor of those engagements by which the parties were required to pay the

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balances thereof on the 1st of *February* 1823, with the interest accruing up to that day, and not having availed themselves of the terms proposed for their accommodation in the advertisements of the 11th and 23d of *January* last, public notice is given by Mr. *Rothschild*, that such receipts are void, that the deposit-money is forfeited, and that all obligation has ceased on his part to deliver certificates at a future period. Being desirous, however, that no individual should suffer unknowingly on this occasion, Mr. *Rothschild* hereby notifies, that he will grant to the holders of his receipts an indulgence of one week from this date, either to pay the balances due by them on the 1st inst., or to make the further deposits called for by the advertisements of the 11th and 23d of *January* last.

“ *New Court, 5th February 1823.*”

And the following on the 11th *February*.

“ *Neapolitan Loan of 1822.*

“ Referring to the several advertisements of the 11th and 23d of *January* last, and 5th *February* instant, which have appeared in the public papers, giving an extension of time for payment of the balances due upon scrip receipts for the *Neapolitan* loan, *N. M. Rothschild* informs the holders of scrip receipts that the loan contracted for has been paid, and the stock certificates are ready for delivery; and he begs that those who have not accepted the terms of extension of payment will take notice, that unless the terms are accepted, or the balances and interest thereon paid on or before the 20th day of *February* instant, he will consider that such holders of scrip receipts do not intend to complete their contracts, and will not hereafter claim the certificates. *N. M. Rothschild* will, therefore, after the 20th *February* instant, dispose of or keep the certificates, and put the proceeds or value of them to the credit of the holders on account of the

balances and interest due, and hold them answerable to him for any loss or deficiency."

On the 11th *March* 1823, the following letter was received by *Hennings*, written by Mr. *Green*, the attorney on the record for Mr. *Rothschild* : —

" Sir, — I am desired by Mr. *N. M. Rothschild* to express to you his surprise, that you have not yet made the further payments on the *Neapolitan* scrip engagements specified in your letter of the 21st *January* last, after having there stated that you should avail yourself of the terms of his offer. With every desire to avoid the adoption of measures which might be unpleasant to you, he cannot suffer a matter of this consequence to remain unsettled; and my instructions are to commence proceedings against you forthwith, if these payments be not immediately made.

" *W. H. Green.*

" To Mr. *Hennings*."

On the 14th *May* following, *Hennings* called on *Rothschild*, and told him that he came to receive or pay up the *Neapolitan* certificates, and then tendered to him 11,375*l.*, which was equal to the amount of the instalments stipulated by the receipts to be paid, and 5 per cent. interest thereon. *Rothschild* refused to accept this sum, saying, " I don't know you; I have nothing to do with you; you are too late, you must go to my lawyer."

On the 23d *June* following, *Hennings* addressed to *Rothschild* the following letter : —

" Sir, — I beg leave to say, I again offer to pay you the balance, with interest up to the present time, remaining due upon the scrip receipts, 4500 ducats *Neapolitan* rentes, upon having the stock certificates with interest coupons belonging thereto delivered to me. And if you continue to refuse to deliver the said stock

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certificates, I require an immediate return of the deposit-money received by you upon those scrip receipts, with interest thereon; and if you decline to do either, which, on consideration, (especially as my claim stands on different grounds with those of other holders of *Neapolitan* scrip,) I trust will not be the case, I shall be under the necessity of commencing an action against you to recover the same."

This letter was delivered to *Rothschild* by *Hennings's* clerk; and *Rothschild* having read it, threw it down, and said, "I can only tell you you must go to my lawyer about it."

Neapolitan scrip began to fall on the 1st *February* 1823, and continued to fall until the latter end of *April*, and fell to 67; but in the beginning of *May*, the entry of the *French* troops into *Madrid* occasioned a rise, and the scrip rose in consequence about 8 per cent. from its lowest price. *Hennings* purchased the certificates of *Lowe* at $77\frac{1}{2}$, and by *March* they had fallen to $67\frac{1}{2}$. They had been gradually rising for some time when he tendered the money to *Rothschild*.

Upon this special verdict judgment was given by the Court of Common Pleas for *Hennings*, the plaintiff below (a), upon which this writ of error was brought. The errors assigned were: That it did not appear in and by the special verdict, that the defendant below ever received any money whatsoever of or belonging to the plaintiff below, so that no action for money had and received could be maintained; and, also, that the original contract in the special verdict mentioned was made between the defendant below and *Lowe*, the original holder of the scrip receipts therein mentioned, and there never was any legal transfer of any right or interest

therein from *Lowe* to the plaintiff below, so as to entitle the latter to maintain any action against the defendant below: and, also, that the money received by the defendant below cannot be recovered back as money received by him on a consideration which has failed, because the plaintiff below *had* all the consideration for which he paid the money, namely, the *option* to take the stock at a certain price.

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The case was now argued by

F. Pollock for the plaintiff in error; who relied on the judgment of the Master of the Rolls (*Sir John Leach*) in *Doleret v. Rothschild*. (a) There *Doleret*, under circumstances similar to the present, did not claim his certificates till the rise in the market caused by the entrance of the *French* army into *Madrid*, and there his Honour lays it down, that time was of the essence of the contract. Here also time was of the essence of the contract, and the defendant in error not having complied in that respect with the terms of the contract, cannot recover back his deposit, which has been forfeited by his own default. There was full consideration given for the deposit, and the plaintiff below cannot recover on the ground of the consideration having failed. The failure of consideration was his own act, in not coming forward in time, and taking up the receipts according to his contract. Moreover, money had and received will not lie, since the parties cannot be thereby placed in *statu quo*; it being an established rule of law, that where money has been paid in part performance of a contract, the remedy to recover it cannot be an action for money had and received, unless thereby the parties are placed in *statu quo*. *Hunt v. Silk*. (b) One party to a contract

(a) 1 Sim. & Stu. 598.

(b) 5 East, 449.

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cannot, for the default of the other, rescind the contract, and recover back money which he has himself paid under it, in an action for money had and received, unless he himself has been prevented from doing any thing in execution of the contract; *Giles v. Edwards.* (a) Now here there was a part execution of the contract by *Hennings*, in his acceptance of the extension of time for payment; and that cannot be rescinded. At all events, therefore, his only remedy would be upon the contract itself. Here, however, he was himself the defaulter; he should have paid the balance due upon the receipts at the time appointed, and then, however the stock had risen, Mr. *Rothschild* would have been bound to deliver the certificates of stock, and would have rendered himself liable to an action by refusal.

Comyn for the defendant in error. The general rule may be admitted, that unless parties to a contract can be placed in *statu quo*, the action for money had and received will not lie to recover back a deposit. But that is not the case before the Court; for in fact the plaintiff in error himself put an end to the original contract by the letter of his attorney to *Hennings*. Besides, here the parties are now in the same situation as when the contract was first made, or must be taken to be so, as no special damage is found upon the special verdict. The question whether there was or was not a good consideration, is not material; for a party making a deposit under such circumstances may recover it back, though there was a good consideration for the contract *in initio*. As to the objection of time, which is so much relied on, it is clear from all the circumstances of the transaction that *Rothschild* waived that point. The true

question is, Whether a party can recover back a deposit paid upon a contract, where that contract has been put an end to by the other party? Now here there was no special stipulation for the forfeiture of the deposit, in case of nonpayment of the balance on a particular day. The receipts were dated 14th *October* 1822, and expressed that the bearer of them was entitled to so much stock, on payment of a further sum on the 1st *February*. The time of paying the balance was afterwards waived. No forfeiture, therefore, had occurred at the time when *Rothschild's* attorney wrote to *Hennings*, 11th *March* 1823, and rescinded the contract. Admitting that there was originally a good consideration, nevertheless, if the contract was put an end to by the party who had received the deposit, the other party may recover it back in this action. The tender by *Hennings* on the 14th *May* was sufficient, and the plaintiff in error can claim no more. [Lord *Tenterden*. It is a point worth consideration, whether *Rothschild's* writing *Hennings's* name on the scrip receipts, makes *Rothschild* liable to *him* for money had and received.] *Hodgson v. Anderson* (*a*) and *Wharton v. Walker* (*b*) are authorities in favour of the defendant in error. Besides, this is expressed to be money received on account of *the bearer*.

Pollock, in reply. Assuming that *Rothschild* had agreed, on receiving the money from *Lowe*, to give *the bearer* of certain scrip receipts stock to a specified amount, still the bearer is no party to the contract, and cannot sue for money had and received to *his* use. Next, it is not to be assumed, because *Rothschild* gave time to pay the several instalments, that time was waived altogether, and ceased to be of the essence of

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(*a*) 3 B. & C. 842.

(*b*) 4 B. & C. 163.

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the contract. Lastly, the recognition of *Hennings* by *Rothschild*, in writing his name on the receipts, was not a recognition of him as *depositor*, but as a person holding scrip for which stock was to be delivered. [Bayley J. The deposit may be considered as the price paid for a right of option.]

On a subsequent day judgment was delivered by Lord TENTERDEN C. J. After reading the special verdict, he said, "On referring to the case of *Doleret v. Rothschild*, which was cited on behalf of the plaintiff in error, in which the Master of the Rolls gave so elaborate a judgment, the circumstances of that case appear to be, in all material respects, the same as the present; and as the Court are quite satisfied with the decision in that case, and with the grounds upon which it was founded, and which cannot be better expressed than in his Honour's judgment, they are willing to adopt those grounds of decision as applicable to the present case; and the consequence is, that the judgment of the Court below must be reversed."

Judgment reversed.

The words of the learned Judge (then Vice-Chancellor) in *Doleret v. Rothschild* are as follow:—"Where a court of equity holds that time is not of the essence of the contract, it proceeds upon the principle that, having regard to the nature of the subject, time is immaterial to the value, and is urged only by way of pretence and evasion. But that principle can have no application to a case like the present, where, from the nature of the subject, the value is exposed to daily variation; and a contract which was disadvantageous to the plaintiff on the 1st February, and would therefore be then declined by him, might be highly advantageous to him on the 2d February. It is true, it is stated in the bill that the time mentioned in the scrip receipts has been waived and abandoned by the advertisements of the de-

fendant; but that waiver was upon the condition that the holders of the receipts made their payments at the extended times stated in the advertisements, which it is admitted has not been done by the plaintiff. The claim of the plaintiff to have the original deposit of 10 per cent. returned to him, as being retained by the defendant without consideration, cannot be maintained, because the plaintiff had full consideration for that deposit, *in the option* which the scrip receipts gave him to become the proprietor of so much stock, by payment of the balance of the stipulated price on the day named; and it is not the less a consideration because he did not think fit to avail himself of that option."

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COLONIAL JUDGMENT.—RATE OF EXCHANGE.

GUILDHALL, June 16.—Before Lord TENTERDEN and a Special Jury.

SCOTT v. BEAVAN.

THIS was an action upon a judgment recovered against the defendant in *Jamaica*, for 1534*l.* of the current money in *Jamaica*, and 8*l.* 8*s.* 4*d.* for costs. These sums, together with interest at 6 per cent., which is allowed by the courts there on judgments, amounted to 1836*l.* 10*s.* 8*d.* currency. The question was, What was the sum to be paid in *English* money?

It was proved that 140*l.* currency is equal to 100*l.* sterling, that being the ratio universally adopted to ascertain what any given sum of the money of the one country amounts to in the money of the other. It appeared further, that the money transactions between the two countries were exclusively carried on by means of bills of exchange drawn in *Jamaica* on *England*, at ninety days' sight; or if drawn at six months, which

If a party is sued in England on a judgment recovered in *Jamaica*, the amount is to be estimated at the par of exchange between England and *Jamaica*, and the defendant is not entitled to deduct the premium which bills on *England* bear in *Jamaica*.

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was seldom the case, interest was allowed for the amount after three months. These bills always bore a premium, varying of late years from about 18 to 22 or 24 per cent., and were bought and sold in the Island like any other commodity, the rate of premium being regularly published in the *Jamaica Weekly Price Current*.

The defendant put in an account rendered to him by the plaintiff, who had acted as his agent in *Jamaica*, in which account the plaintiff struck the balance in sterling money, by computing 100*l.* sterling for 140*l.* currency, and crediting the defendant for the premium on the bills which he (the plaintiff) drew on him for the balance. And enough having been paid into court to satisfy the judgment upon this computation, the simple question was, Whether the defendant was entitled to deduct the premium or not, the difference amounting to about 800*l.*?

The *Attorney-General*, for the plaintiff, contended, that he was entitled to receive the same number of sovereigns here as he would have been entitled to receive in *Jamaica*. The defendant was bound to pay the money in *Jamaica*, and had no right to speculate what the plaintiff might have done with the money when paid. He might have invested it in whatever he pleased, either in produce of the Island, or in specie for remittance, or in purchases. The rate of exchange between *England* and *Jamaica* was the difference between the pound sterling and the pound currency, and this was quite distinct from and unaffected by the premium given for bills intended for remittance. The premium was very uncertain, depending for its amount on a variety of circumstances. Thus, if the market for colonial produce was low in *England*, and the credit of the Island generally bad, very large premiums were given for good bills on *England*, whilst a person of doubtful credit

would get a proportionably lower premium for his bills. The plaintiff might have demanded gold; he might have remitted the specie, and then the sum would have been depreciated to him by the expense of freight and insurance only. In short, a creditor had a right to be paid in the coin of the country. What he might do with it afterwards was for him, and not the debtor, to determine.

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Campbell for the defendant. The question is, What amount, in money of this country, the plaintiff is entitled to recover? The sum for which the judgment is given is foreign money: suppose it had been *French* money. If the sum recovered were 1000 francs, in order to see how much the judgment creditor is entitled to here, you must look at the real state of exchange existing at the time between this country and *France*, whatever that may be, and not to the par of 24 francs to the pound sterling. So here the real state of exchange between *England* and *Jamaica* is not the par of 140 to 100, but must be ascertained by adding to that par the premium upon bills. Besides, it is evident from the account rendered by the plaintiff himself, that such was the principle of computation adopted by themselves, and that upon that principle their dealings were conducted.

Lord TENTERDEN C.J. in his charge to the jury said, "The question is, at what rate you are to estimate the sum recovered in *Jamaica* which is to be paid in *England*. The defendant *assumes* that the plaintiff would have remitted this sum to *England*, and it is upon this assumption that his argument rests; whereas the plaintiff might have spent the money in *Jamaica*, or remitted it in specie, or bought produce with it. The answer to the defendant's argument is, 'You ought to have paid the money in *Jamaica*.' I am of opinion, in

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point of law, that the sum should be calculated according to the established rate of 140*l.* currency for 100*l.* sterling, and that the defendant is not entitled to deduct the premium."

Verdict for plaintiff.

IMPLIED WARRANTY OF GOODS SOLD.

GUILDHALL, Feb. 26.—Before BEST C. J.

JONES v. BRIGHT and Others.

Where an article is sold by the manufacturer expressly for a particular purpose, there is an implied warranty to the purchaser that the article shall be reasonably fit for that purpose, or at all events against latent defects, arising from the want of skill or care in the process of manufacturing.

Qu. Where the seller is not the manufacturer.

AIsabella, falsely and fraudulently sold him copper which had been made and manufactured by them as and for copper of a superior quality, and reasonably fit and proper for the said purpose, whereas the said sheets of copper were not, at the time of the said bargain and sale, copper of a superior quality, or reasonably fit, &c.; and that the said defendants had knowingly deceived the said plaintiff in the sale of the said copper as aforesaid. The second count stated the warranty to be to supply copper of the best and purest copper ore, and reasonably sufficient for the purpose aforesaid. There were other counts slightly varying the statement of the contract, but with a similar warranty. The defendants pleaded the general issue. To support the contract of warranty the plaintiffs put in the invoice, and the receipt for payment given by the defendants. The former was as follows:—“ Copper

warehouse, *Small Street, Bristol.* Mr. *Joshua Jones.* Bought of *John Freeman and Copper Company, for ship Isabella,*" [here followed an account of the quantities and prices of the articles supplied, which were specified simply as "sheet nails, bolts, &c."] "six months." A witness was also called who had introduced the plaintiff to the defendants, and was present at the bargain: the substance of his evidence was, that on introducing the plaintiff, he told the defendants that the plaintiff wanted *copper sheathing for his vessel;* and he had pleasure in introducing him, *because he knew that they would supply him with a good article:* to which one of the defendants said, *he might depend upon their supplying him well.* The rest of the evidence went to shew that the *Isabella*, after being coppered with the sheathing sold by the defendants, made one voyage to *Sierra Leone*, where she lay eighty-seven days; that she then returned to *Bristol*, when, upon examination, the copper about the bows, and for a few feet below the light water-mark, was discovered to be so corroded and decayed that the plaintiff was obliged to strip it off, and replace it with new. It was stated that copper usually lasts four or five years. The witnesses were not agreed as to the cause of the more rapid decay which it is sometimes found to undergo; but they imputed it generally to an excess of oxygen, which had not been sufficiently expelled in the process of manufacturing. The plaintiff's counsel admitted that they did not impute fraud to the defendants, but negligence only, in not supplying the plaintiff with copper of such a quality as by the terms of their contract they were bound to provide.

Campbell, for the defendants, now submitted that there must be a nonsuit, inasmuch as no deceit having been proved, or even pretended, the plaintiff's case rested entirely on a breach of a contract of warranty, either

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express or implied; that there was no evidence of an express warranty, for the invoice, which was the only evidence of any contract between the parties, contained no warranty, and the effect of that written contract could not be altered by any thing that passed in conversation between the parties. *Meres v. Ansell.* (a) Neither was there an implied warranty. That the notion of a warranty implied from the price had been long exploded; that the rule of *caveat emptor* was here strictly applicable, the plaintiff having had a full opportunity of examining, had he chosen to do so, every sheet of copper before it was put on. That though Lord Tenterden, in *Gray v. Cox* (b), thought there was an implied warranty that the goods should be reasonably sufficient for the purpose for which they were sold, yet all the cases were against that doctrine; and if that were held to be law, then there must be an implied warranty in every sale, for every article was sold for some particular purpose.

BEST C. J. There is a difference between this case and that of *Gray v. Cox*: the defendants here were the manufacturers of the copper; there, the merchants only. If a man manufactures goods, he knows what deviation in the process will prejudice the quality of the article; and he must be considered as warranting against all defects arising from imperfect manufacture, and as undertaking that due pains have been used, by the supplying of proper materials, and the application of the requisite skill, to exclude such defects.

The defendants then went into evidence at considerable length, to shew that other vessels had been coppered with sheathing manufactured at the same place, and at the same time, as the copper sold to the plaintiff, which had proved to be free from any

(a) 3 Wils. 375.

(b) 4 B. & C. 108.

defect; and that the rapid decay in this probably arose from the adhesion of vast numbers of barnacles, as was not uncommon off that coast.

BEST C.J. left it to the jury to say, whether the state of the copper sheathing on the *Isabella* arose from any intrinsic defect, or from extrinsic circumstances; and if from the former, whether the defect was in the materials, or in the want of due skill and care in the manufacture. The jury returned their verdict for the plaintiff, giving it as their opinion that the decay of the copper arose from some intrinsic defect, but that of the cause of the defect there was no satisfactory evidence.

In the following *Easter* term, a rule *nisi* for a non-suit was obtained by *Ludlow* Serjt., on the ground taken at the trial, against which cause was shewn by *Wilde* and *Russell* Serjts. They founded their argument principally on this, that when a commodity is bought for a purpose expressly specified by the buyer, the rule of *caveat emptor* does not apply, and that the seller impliedly warrants that the article shall be fit for that purpose: that if this holds true of a seller generally, much more does it where the seller is also the manufacturer. If, indeed, the defect be an apparent one, or such as the buyer may, by the exercise of ordinary care, detect, then perhaps the consequences of his inadvertence ought to fall upon himself; but where the fault is latent, where it arises, as in this case, from an intrinsic imperfection in the process of manufacturing, what means has the *buyer* of ascertaining the unfitness, or who should more justly bear the loss than the manufacturer? In support of these positions, they cited *Laing v. Fidgeon* (a), *Pasley v. Freeman* (b), *Yeats v. Pim* (c), *Gardiner v. Gray* (d), *Okell v. Smith* (e), and

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(a) 6 Taunt. 108. (b) 5 T.R. 57. (c) 6 Taunt. 446.
 (d) 4 Campb. 144. (e) 1 Stark. N.P.C. 108.

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Bluett v. Osborne. (a) The cases of *Fisher v. Samuda* (b), *Parkinson v. Lee* (c), and *Gray v. Cox* (d), they said, were distinguishable. In the first, the plaintiff had lost his remedy, by having, when sued for the price of the commodities, omitted to set up the bad quality of them, either in bar of the action, or in reduction of damages. In *Parkinson v. Lee*, the defendants had merely sold the hops by samples; and it was sufficient, therefore, to shew that they corresponded with the samples: again, they were not the *growers*, and could not be supposed to have any knowledge of their defects. In *Gray v. Cox*, the judgment of the Court turned upon the variance between the allegation in the declaration and the proof. Moreover, the defendants there were but the sellers, not the manufacturers of the copper; yet Lord *Tenterden* expressed a strong opinion, that there was, even in that case, an implied warranty that it should be reasonably fit for the purpose for which it was expressly bought.

Ludlow on the other hand contended, that to make the defendants liable, there must be a warranty either in deed or in law. (e) Now there was no pretence in this case for saying that there was an express warranty; and to raise the warranty in law, it must be shewn that there was some deceit. The declaration was expressly framed upon the assumption that the defendants knew that the copper was unserviceable, and that allegation was material; otherwise the law must rest upon the dictum of Lord *Tenterden* in *Gray v. Cox*, — a dictum, it must be observed, not sanctioned by the rest of the Court. That doctrine, indeed, was one of great hardship upon the dealer; for, if carried to its full extent, no person, however careful, could protect himself

(a) 1 Stark. N. P. C. 384.

(b) 1 Campb. 190.

(c) 2 East, 514.

(d) 4 B. & C. 108.

(e) 1 Inst. 102. (a).

against even accidental failures in the quality of the commodity sold by him. As to the cases cited; In *Yeats v. Pim*, the warranty was express, and the remarks there made were but *obiter dicta*, not necessary to the judgment: *Laing v. Fidgeon* was much relied on, and yet there was this material distinction, that *there* the buyer never had an opportunity of inspecting the commodity: *Gardiner v. Gray* turned upon this, that the goods supplied did not correspond with the sample: *Bluett v. Osborne* furnished an authority equally strong for the defendant; for Lord *Ellenborough* there said, "In this case the bowsprit was apparently good, and the defendants had an opportunity of inspecting it; no fraud is complained of, but the bowsprit turned out to be defective on cutting it up; I think the plaintiff is not liable for the subsequent failure;" — a remark which applied exactly to the case under consideration. That the seller was not answerable for latent defects, was established by the case of *Parkinson v. Lea*.

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BEST C. J. This action is brought to recover damages for the insufficiency of copper furnished to the defendants for a purpose particularly specified. I do not confine my attention to the invoice, as containing the whole evidence of the contract, for I consider all which passed at the time of the introduction of the plaintiff to the defendants as forming part of the transaction. They were expressly told for what purpose the copper was wanted by the plaintiff; and the answer of one of them, that they would supply him well, amounted, in my judgment, to a warranty. Whoever sells an article, warrants that it shall be worth something; whoever sells for a particular purpose, warrants that the thing sold shall be fit for that purpose. Warranties of horses, indeed, stand on a different footing. In general, there

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is no implied warranty as to them ; and why ? Because the seller may himself be ignorant of the animal's defects. But how can the manufacturer be supposed ignorant of the faults of the article which he manufactured ? Or who should be the sufferer by the want of skill or care in the process, if he should not ? Even horses, if expressly bought for a particular service, as for a carriage, or the like, are considered as guaranteed by the seller to be fit for that service. Here the copper was sold for the purpose of sheathing a ship ; and it was unfit for that purpose, by reason of an intrinsic defect in the manufacture. The verdict, therefore, must stand for the plaintiff.

The rest of the Judges concurring,

The rule was discharged,

The words of Lord *Tenterden* in *Gray v. Cox*, in which case all the authorities underwent an elaborate discussion, are as follow :— “ At the trial it occurred to me, that if a person sold a commodity for a particular purpose, he must be understood to warrant it reasonably fit and proper for such purpose. I am still strongly inclined to adhere to that opinion, but some of my learned Brothers think differently.” This doctrine of the learned Chief Justice was certainly received with approbation by Chief Justice *Best* and Mr. Justice *Park* in the present case. As there exists, therefore, a difference of opinion upon the subject, it is not improbable that the point may at some time be reserved for the consideration of the whole Bench. At present it must be regarded as undetermined. Equity, and perhaps policy, seem, at first sight, to plead strongly for the rule as laid down by Lord *Tenterden* ; and yet it is certainly somewhat of an encroachment on the old maxim of *caveat emptor*. And there is great, if not insuperable force in the argument which has more than once been made use of at the bar ; viz, that every article of sale is bought on the understanding that

it is reasonably fit for the purpose for which it is bought; and thus an enquiry might be set on foot in every transaction of sale, whether the commodity has fairly answered that purpose. The inconvenience, nay the impossibility, of following up any such rule must at once suggest itself. *A.* and *B.* buy each a pair of boots for the same price: *A.*'s boots are worn out in three months, whilst *B.*'s continue serviceable for twelve; whereupon *A.* sets up as an answer to the boot-maker's claim for the price, that the boots were not reasonably fit for the purpose for which they were bought. And a jury are impanelled to try what is a reasonable time for boots of such a price to continue in wear, taking into account the weight of *A.*'s body, the peculiar mode of his pressure upon the foot, the number of miles he was in the habit of walking per day, the state of the pavement, how often the boots were in fact worn, &c. &c., as compared with all the like circumstances in *B.*'s case. This seems, and is, absurd enough; but let the rule be introduced, and where is the limit?

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LIEN OF VENDOR.

In the KING'S BENCH.—*Easter Term.*

WINKS and Another, Assignees of WHITE, a Bankrupt, v. HASSALL and Another.

A. buys two pipes of wine in bond: the agent of the seller gives him a delivery note, upon which one pipe is subsequently delivered to his order, the other remaining in the bonded warehouse, at a rent charged to A.; he having become bankrupt, his assignees claim that pipe on payment of the warehouse rent: Held, that the seller had a right to retain it until the duties advanced upon it were repaid him.

TROVER for a pipe of wine. The cause was tried on the 23d of February last before Lord Tenterden at Guildhall, when it appeared, that on the 8th December 1824, the bankrupt *White* bought two pipes of port wine from Messrs. *Stroud and Smith of London*, through their agent at *Manchester*, *G. Wilkinson*, who thereupon wrote the following delivery order:—

“Messrs. *Hassall and Co. Chester*.

“You will please deliver Mr. *Thomas White* of this place, or his order, the two pipes of port wine *ex Wakefield*, as per numbers and marks annexed, free of all expenses of freight and bonding, for which will thank you to value on the house in *London*.

“*G. WILKINSON, Manchester,*

“8th December 1824.

“Two pipes port wine, Nos. 1. and 2., *ex Wakefield*, from *Oporto*, free in bond.

“*G. WILKINSON.*”

The wine was then in bond in the king's stores at *Chester*; and the price agreed upon was 36*l.* per pipe, *White to pay the duties*, for which the defendants had given the usual bond to the collector of the customs. The defendants sent the bankrupt samples, and, upon a sale of one of the pipes by him, delivered it under his order to the vendee. An account was subsequently fur-

nished by them to the bankrupt for warehouse rent, &c.
upon that pipe, as follows: —

" Mr. White,	To Hassall and Co.	1829.
	£ s. d.	
" Rent on one pipe port, from, &c.	- 4 0 6	
" Porterage 1s. 6d. Cooperage 4s. 2d.	0 5 8	
	<hr/>	
	4 6 2	
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" Dec. 7. By cash	£ s. d.
	4 6 2

" For Hassall and Co. J. HEWETT."

The bankrupt not having disposed of the second pipe, made no further communications respecting it to the defendants. On the 18th October 1825, the bankruptcy having taken place, the plaintiffs, as assignees, demanded it from the defendants, offering at the same time to pay the amount of their claim upon it, which was accordingly furnished to them as follows: —

" Hassall and Co.	To Henry Hesketh.	WINKS v. HASSALL
	£ s. d.	
" Warehouse rent, &c.	- 5 3 0	
" Paid cooperage, &c.	- 0 8 4	
	<hr/>	
	5 11 4	
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The defendants at the same time stated, that the above sum was the only claim which they had upon their own account, but they refused to receive it when tendered to them, or to give up the wine, unless also paid the duties upon that pipe, amounting to 27*l.* 10*s.*, acting, as they said, upon the instructions of Messrs. Stroud and Co. They added at the same time, that though the duties had been originally paid by themselves, they

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had been since repaid or settled in account with Mr. *Stroud*.

Upon this evidence, Lord *Tenterden* thought that the plaintiffs must be nonsuited. *Stroud*, he said, could not have got the wine out of bond without paying the duties. Now the payment by the defendants might be considered as a payment by him. Such payment having created a right of lien, it was competent for *Stroud* to make the defendants his organ for asserting that right. And the refusal of the defendants to give up the wine, in consequence of *Stroud's* directions, amounted in fact to an assertion by himself personally of his right of lien. To an objection that in paying the duties the defendants had acted officiously and without authority, and that it must be considered, therefore, as a voluntary payment, his Lordship replied, that that could hardly be, when a bond had been given by the defendants for the payment. The plaintiffs were thereupon nonsuited, with leave reserved to apply to the Court to set the nonsuit aside.

Campbell moved accordingly, contending, 1st, that the defendants had no lien on their own account: all which they claimed as due to themselves had been tendered to them. The amount paid for duties had been repaid to them; and even were it otherwise, yet, as that payment was voluntary, it could give no right of lien. That it was voluntary was clear; for the provisions of the bonding act were such, that they could not have been compelled to pay the duties. (a)

2dly, Neither had *Stroud* and Co. any lien upon the wine. For, in the first place, they had not the possession in

(a) The sixty-first section of that act (4 G. 4. c. 24.) provides, that if bonded goods are not cleared at the expiration of three years, the commissioners may sell them; and that upon such sale the bond entered into on warehousing them shall be forthwith cancelled and discharged.

fact, which was essential to that right; and in the next place, if it ever had existed, or might have existed, it was certainly waived by the unconditional delivery order given to the bankrupt by their agent *Wilkinson*. Thenceforth *Hassall* and Co. became the warehouse-keepers and agents of the purchaser. The vendor parted absolutely with his possession, and therefore with his lien.

Lord TENTERDEN. The wine was in a bonded warehouse, and the duties must be paid. Ought not the assignees, then, to refund the duty money before they can have the wine? If the duty had not been paid by the defendants, the government might have sold the wine; and therefore it was for the benefit of the owner of the wine, whoever he was, that they should pay it. It cannot be called a payment by a stranger, for they were parties to the original transaction.

BAYLEY J. Granting that a delivery order was given by *Stroud* and Co., yet *White* must have paid the duty, if they had insisted upon it, before he could have got the wine.

PARKE J. *Stroud* and Co. are the unpaid vendors, and are not bound to deliver until payment. The delivery order was not a transfer of possession. It was not acted upon as to this pipe, and might have been recalled, if *White* were found undeserving of credit. Now here he was in fact insolvent. To me it seems the case of an unpaid vendor retaining possession of goods until he is paid. *Bloxam v. Sanders* (a) is an authority that

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(a) 4 B. & C. 948.

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the charge of warehouse-rent does not of itself operate as an absolute change of possession.

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Rule refused.

Assignees of a bankrupt in one respect resemble a corporation: they have no conscience. Their duty is to swell the fund to be distributed among the creditors, and they are not particularly scrupulous as to the mode of doing it. The question, therefore, is in this as in all other cases where they are concerned, had they, *in strictness of law*, a right to make this claim?

The question would have been free, we apprehend, from all doubt, had the fact simply been that *Hassall and Co.*, having paid the duties, claimed to retain the wine till reimbursed; because then they might fairly have been considered as the agents of the bankrupt in that payment, and would certainly have had a lien on his property for the repayment. But their own declaration, and the fact that they had been credited in account by *Stroud and Co.* for that sum, negatived such an inference; and they must, consequently, be regarded as representing *Stroud and Co.* in the claim of lien. Then had *Stroud and Co.* such a lien? This must be answered by determining what was the effect of the delivery-note given to the bankrupt by their agent *Wilkinson*. The agreement certainly was that the buyer should pay the duties; but was it intended to give him credit for that sum as part of the price, or was payment of the price and duties, or of either, to be a condition of the delivery? Now it is observable that no condition of any kind appears upon the note. The wine was to be delivered to the order of the buyer. A part was in fact delivered, and it does not appear (although such a circumstance would have been very material), whether for that part the price and the duty on either was actually paid upon the delivery. Mr. Justice *Parke* considered that the delivery order was still unexecuted with respect to the pipe of wine remaining, and that the vendor had, consequently, a right to retain until payment. And admitting the premises, the conclusion undoubtedly follows. But was there or was there not in

fact such a delivery to the buyer as in law amounts to an absolute change of possession? The law upon this point is by no means free from perplexity. Some confusion has, perhaps, arisen from not distinguishing between the seller's right of lien in respect of his possession, and his right to stop *in transitu* after the goods have left him, and before they have reached the buyer. As to the former, it has never, so far as we are aware, been determined that a delivery of part of the thing sold operated in itself such a transfer of possession as to the whole, as to defeat the lien of the seller upon what remained. The question arose in the case of *Hanson v. Meyer* (*a*); but the Court declined to decide it, founding their judgment on what admitted of no doubt; viz. that there was in that case no change of possession, something still remaining to be done by the buyer, before the delivery could be complete. There is certainly no very palpable reason why a part delivery should have such an effect, because, as was well observed by Mr. Justice Bayley, in the case of *Holderness v. Shackels* (*b*), a person may consent to give up a part, in the idea that he still retains enough to satisfy his lien. There was, indeed, in the case now before us, the further circumstance that the buyer was debited with the warehouse-rent; but on this, as we have seen in the case of *New v. Swain* (*c*), the Court is inclined not to lay much stress; and the result, therefore, of the recent decisions on this subject may be stated thus: that the present disposition of the Court of King's Bench at least is to favour the equitable right of lien, and not to regard it as waived or defeated by any refinements of constructive delivery.

(*a*) 6 East, 614.

(*b*) *Ante*, p. 203.

(*c*) *Ante*, p. 193.; and see the note following that case. Of stoppage *in transitu* we shall have occasion to speak more fully hereafter, a case very peculiar in its circumstances having recently been determined by the Court of King's Bench.

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NEGOTIATION OF STOLEN BANK-NOTE ABROAD.

In the KING'S BENCH. — *Hilary Term.*

**DE LA CHAUMETTE v. The Governor and Company
of the Bank of ENGLAND.**

A Bank of England note, which was stolen in England in February 1826, was remitted, in May 1827, by a merchant in Paris to the plaintiff, his correspondent in London. On his presenting it at the Bank, it was stopped as a stolen note, and payment of it refused. The foreign merchant, when he remitted it, was indebted to the plaintiff in a sum exceeding its amount; but the plaintiff did not before its stoppage make him any further advance on the credit of it. In trover for the note, Held, that the plaintiff must be considered only as the agent of the foreign merchant, and could recover only on his title:

Held, secondly, that the plaintiff was bound to show that the foreign merchant gave such value for it as to exempt him from all suspicion of knowing that it had been improperly obtained.

Qu. Whether a promissory-note made in England is transferable by indorsement or delivery abroad?

offered *Hasleden* their services to assist him in finding out the thief; they stated that the party who had sold the note to them was one *Emerique*, a bullion dealer at *Paris*; that he had bought it from another bullion dealer, named *Duval*, residing at the *Passage du Panorama*, in *Paris*, who had bought it of an *English* gentleman, whose name and address he was ignorant of. The letter went on to state that this, though a vague mode of dealing, was one very current among the bullion dealers of *Paris*; for that the addresses given them being generally false, no precaution could well be taken beyond ascertaining the genuineness of the note. *Odier* and Co., in conclusion, professed their willingness to summon *Duval* before a commissary of police, but stated that they thought it would be of no use. The plaintiff's clerk was called to prove a translation of this letter, and he stated that the plaintiff was a merchant in a large way of business, and was in the habit of receiving from several houses in *Paris*, among whom were *Odier* and Co., large remittances in bank-notes and bills; that he had received such remittances from *Odier* and Co. to the amount of 40,000*l.* in a year; that in May 1827 *Odier* and Co. were indebted to him in the sum of 1700*l.*, and on the 28th of that month remitted to him 1333*l.* in notes and sovereigns, of which the note in question formed part. *Odier* and Co. made remittances to the plaintiff from *Paris* to *London*, and the plaintiff remitted to them from *London*, taking advantage of the course of exchange, and at the end of each year they divided the profits, each firm being responsible for the paper it transmitted. The witness proved also that 500*l.* Bank of *England* notes were the common subject of sale by the money-changers of *Paris*; and that when they sold them they only put their names upon them, and guaranteed their genuineness in a separate instrument, called a *val*. The balance

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of 1700*l.* due from *Odier* and Co. to the plaintiff was considerably reduced at the time of the stoppage of the note by the defendants.

Upon these facts, it was contended for the defendant, first, that the plaintiff must be taken to have received the note as the agent of *Odier* and Co., and could therefore recover only on their title, not having given them any additional credit upon the note before he had notice that it was stopped; *Solomons v. Bank of England* (*a*); secondly, that if that were so, then the plaintiff was bound to shew that *Odier* and Co. were *bonâ fide* holders for value; and, thirdly, that promissory-notes made in this country being negotiable, not by the custom of merchants; but only by statute (*b*), were not assignable abroad, but were there in the nature of mere chattels; and that, therefore, the property in this note was never out of *Hasleden*, from whom it had been stolen. Lord *Tenterden* reserved the last point, as being one of very general importance; and said that on the first he was of opinion that the plaintiff must be taken in this cause to be identified with *Odier* and Co., and that he could only recover on their title; and he directed the jury to find for the plaintiff if they thought *Odier* and Co. took the note in the ordinary course of their business. The jury found a verdict for the plaintiff.

In the following term, *Bosanquet Serjt.* obtained a rule *nisi* for a nonsuit on the point reserved, or for a new trial, on the ground that it was incumbent on the plaintiff to prove that *Odier* and Co. gave full value for the bill. Against this rule,

Sir James Scarlett and *Platt* shewed cause. There is no ground for imputing to the plaintiff that he obtained

(*a*) 15 East, 155.

(*b*) 5 & 4 Anne, c. 9.

the note in question otherwise than in satisfaction of a debt due to him from *Odier* and Co. Having so received it, he acquired a property in it, and a right to sue upon it. It would have been otherwise if, as was the case in *Solomons v. The Bank of England*, he had received it as the agent of *Odier* and Co., no debt being due from them. But even if the plaintiff must be considered, for the purposes of this cause, as identified with *Odier* and Co., the latter did not receive the note under circumstances calculated to excite in the mind of a prudent man, suspicions that it had been dishonestly come by. They received it in the ordinary and usual course of dealing. They readily offered, when applied to as to the mode in which they became possessed of the note, to assist in tracing it, and gave up the names and addresses of the parties through whom it had come to them, both bullion dealers in *Paris*. No imputation was cast on the respectability of *Odier* and Co., and it was proved that they were in the habit of receiving, and transmitting to *England*, large sums in bank-notes. In *Solomons v. The Bank of England* the circumstances were very different. It was proved there that bank-notes of the amount in question were not usually current at *Middleburgh*, and the only account given of the mode in which the note in that case was taken, was that the plaintiff's correspondents had received it in payment for goods from a man dressed in such a way, of whom they knew nothing. Here there was ample evidence to warrant the jury in their finding, that *Odier* and Co. took the note in the ordinary course of business.

Bosanquet Serjt., and *Pollock, contra.* First, the plaintiff was the agent of *Odier* and Co., and is identified with them, and can recover only on their title. Though they were indebted to him when they transmitted to him this note, he never made them any further advances on

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the credit of it. If the argument for the plaintiff were to prevail, any person who has obtained a bank note abroad under such circumstances, that he could not sue upon it, may remit it to a creditor in *England*, and so enable *him* to sue; that is, may impart to another a title which he has not himself. *Solomons v. The Bank of England* is a direct authority against that position. There the plaintiff received the note from his correspondents at *Middleburgh*, they informing him that they should draw on him for the amount at some future period; and there he was considered as their agent, and as being identified with their title. Here, also, the parties are mutual agents, acting for each other in carrying on these money exchanges, and, moreover, each responsible for their own paper. Secondly, *Odier* and Co. do not show in their letter that they gave full value for the note. They say that they bought it of *Emerique*, and he of *Duval*; and their own statement shows, that *Duval*, on buying it, merely ascertained its genuineness, but made no enquiry about the person (an *Englishman*) who sold it him; circumstances which would clearly have precluded *Duval* from suing on it, if the transaction had taken place in this country, *Gill v. Cubitt* (a), *Down v. Halling* (b), *Snow v. Peacock*. (c) Moreover, *Odier* and Co. received it, not in payment in the course of business, but by way of purchase; it is not, therefore, in their hands, to be treated as an instrument transferable by delivery, but as subject to the rules applicable to matters of mere sale and purchase: they were bound, therefore, to show that they gave full value for it. Thirdly, the negotiability of promissory notes payable to bearer depends not on the custom of merchants, but on the statute 3 & 4 Anne, c. 9., which makes

(a) 3 B. & C. 466.

(b) 4 B. & C. 330.

(c) 3 Bing. 406.

them assignable and indorsable in the same manner as *inland* bills of exchange. The only effect of that statute is to make them negotiable by indorsement *in England*; abroad, a promissory note made here remains, as before the statute, a mere chattel. In *France*, also, bills of exchange are transferable by a particular ordinance, not by the custom of merchants (*a*); and it does not appear that promissory notes stand on a different footing there. In *Carr v. Shaw* (*b*), this Court intimated a strong opinion that the statute did not apply to foreign notes. If that be so, the property in this note was never out of *Hasleden*, since it was obtained from him by felony.

Cur. adv. vult.

Lord TENTERDEN C. J. We think the rule for a new trial should be made absolute. The plaintiff and *Odier* and Co. were mutually agents for each other; the plaintiff being the agent in *England* for *Odier* and Co., and they in *France* of the plaintiff. It certainly appeared that there was a balance of 1700*l.* due from them to the plaintiff when they remitted to him the note in question. But he did not, on the faith of this note, make *Odier* and Co. any fresh advance, or give them any further credit, than he would if he had never received the note from them. And, therefore, unless we can say that a party in possession of a note, however improperly he may have come by it, may, by merely remitting it from abroad to his creditor here, enable the latter to recover on it, we must consider the plaintiff as identified with and representing *Odier* and Co., and as being entitled to recover only on their right. Then comes the next question, whether *Odier* and Co. could

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(*a*) Pothier, *Contrat de Change*, in his works, vol. iii. p. 125.

(*b*) Hil. 1799. Bayley on Bills, 22. But see *Pollard v. Herries*, 3 B. & P. 335.; *Splitgerber v. Kohn*, 1 Stark. N. P. 125.

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sue in respect of this note. That involves two points, — one of fact, the other of law ; the first, whether they gave such value for the note as to remove all reasonable ground for supposing that they could know it to have been improperly obtained ; the second, whether, though the transaction were clearly *bond fide*, notes of this description are or are not transferable abroad ; because then, perhaps, the parties who have taken it even *bonâ fide* may not be able to recover on it. If the cause is sent down again for trial, *Odier* and Co. will probably prove that they gave full value for this note, and under circumstances exempting them from all suspicion ; and we think the cause should go down again for trial, to enable them to prove that fact. Then, if the other point of law be taken, it may be raised on the record. That is a question of great importance, to which I should be desirous of devoting much consideration before pronouncing an opinion on it. We should be unwilling to produce any inconvenience by checking the circulation of Bank of *England* notes abroad. But there are facts which have come to our knowledge, against which we must not shut our eyes, and from which we are aware that a practice prevails, to a certain extent, of conveying abroad stolen notes of large amount, negotiating them there, and remitting them to persons who may sue upon them in this country. Upon the whole, we think that, on the grounds to which I have referred, the rule for a new trial should be made absolute.

Rule absolute.

The cause was tried again at the sittings before *Michaelmas* term, when the plaintiff proved that *Odier* and Co. bought the note of *Emerique*, who was one of the most respectable money-changers of *Paris*, on the 25th of *May* 1827, giving full value for it according to the rate of ex-

change on that day; and a verdict was taken for the plaintiff for 500*l.*, subject to the question of law on the negotiability of the note abroad; the defendants entering into a rule to pay interest at $4\frac{1}{2}$ per cent. from the time of granting the new trial to the time of final judgment, if it should be in the plaintiff's favour.

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BANKER'S CHEQUE TAKEN WHEN OVER-DUE.

In the KING'S BENCH.—*Easter Term.*

ROTHSCHILD v. CORNEY and Others.

ASSUMPSIT for money had and received to the plaintiff's use, and on the other money counts. Plea, the general issue. The action was brought to recover the sum of 1330*l.*, the amount of two cheques drawn by the plaintiff on *Masterman and Co.*, bankers, which had been fraudulently obtained from him by one *Burn*, his clerk, in the following manner:—The plaintiff was contractor for the *Prussian* loan, the dividends on which were paid at his counting-house. The custom was, for the holders of *Prussian* bonds, when the dividend upon them became due, to leave the dividend warrants, called *coupons*, together with a list of them, and the name and address of the holder, at the plaintiff's counting-house, two days before payment, for examination. The coupons and lists thus left were compared, and the amount of the list cast up, and when checked and ascertained to be correct, the coupons were cancelled by stamping on them in red ink, “*N. M. Rothschild, paid,*” and a cheque was filled up for the whole amount of the list,

A party taking a cheque overdue, does not necessarily take it subject to all the infirmities of its previous title, provided he exercise reasonable caution in taking it; and whether he has done so or not, is a question for the jury upon all the circumstances of the case.

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signed by the plaintiff, and delivered on the second or third day to the person by whom the list and coupons had been presented. The cheques so given were crossed with the words "and Co.," signifying that they must pass through the hands of some banker, whose name would be prefixed, and be paid at the clearing-house. The examination of the lists, and the filling up of the cheques, and cancelling of the coupons, were necessarily entrusted to clerks; and *Burn*, being so employed, after having filled up cheques for the parties who had left the coupons, instead of cancelling the latter, was in the habit of secreting them in their uncancelled state, and afterwards of making out new lists of the same coupons in the names of different persons, and procuring confederates to present a second time the old coupons with the new lists, whereupon he again filled up cheques for the same coupons, and took them to the plaintiff for signature, and afterwards obtained the money for them at the bankers. On making up the books relating to the *Prussian* loan, it was discovered that, among others, coupons to the amount of 1330*l.* had been twice paid. Two lists had been made out, one in the names of *Sillem* and *Grantoff*, the other in the name of *Sarans* and Co. (both houses of considerable eminence in *London*), and both countersigned by *Burn*. Two cheques had been signed for the amount (the same having been previously paid to the *bond fide* holders), one for 791*l. 5s.*, the other for 538*l. 15s.*, which were also countersigned by *Burn*. They were dated the 19th *January* 1828, and were found to have been paid by the defendants into the banking-house of *Remington* and Co. on the 24th of *January*. The defendants became possessed of them in the following manner:—One *Brady*, a confederate of *Burn*, was the son of a wine-broker with whom the defendants, as wine-merchants, had

dealings : he had delivered the cheques to his father to get them cashed ; but *Masterman* and Co. refused payment of them, because being crossed with the words " and Co." they must first go through a banking-house. *Brady* the father having no banker, thereupon applied to the defendants to let the cheques pass through the hands of their bankers, *Remington* and Co., to which they assented, and gave *Brady* drafts for the amount, which was paid him by *Remington* and Co. *Brady* the son absconded on possessing himself of the money.

At the trial before Lord Tenterden C. J. at *Guildhall*, sittings after *Hilary* term, his Lordship left it to the jury to say whether, looking at all the circumstances of the case, the defendants had exercised reasonable caution in taking the cheques. The jury found for the defendants.

Sir James Scarlett now moved for a new trial, contending that the circumstances attending the taking of the cheques were such as should have put the defendants on their guard, and made them enquire into the manner in which cheques of so large an amount, and over-due, came into the possession of *Brady*, who was known to the defendants only as a wine-broker in a small way of business ; and he relied on *Down v. Halling* (a) as an authority that where a party takes a cheque after it is due, he has no better title than the party from whom he received it, and must show the manner in which that party became possessed of it ; and that in this respect there was no difference between bills of exchange, promissory-notes, and cheques. Lord *Ellenborough*, indeed, said in one case that a cheque was emphatically a bill of exchange.

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Lord TENTERDEN C.J. No fixed time can be laid down after which if a cheque over-due be taken, it is to be subject, in the hands of the holder for value, to any infirmities under which the previous title to it may labour. The length of time since it was due, its amount, the conduct and appearance of the person offering it — these are all circumstances very fit to be taken into consideration, and to be observed upon by the judge in presenting the case to the jury for their decision; and the right question to be left to the jury in these cases is, whether, on the whole, proper caution has been used on the part of the person taking the cheque? That was the point left by me to the jury at the trial, which they have decided in the affirmative. And if the cause were sent down to trial again, the same question must be again left to them.

BAYLEY J. The defendants ought, perhaps, on finding that the usual course required at *Rothschild's*, with respect to the cheques passing through a banker's hands, was departed from in this instance, to have paused and made some enquiry; but it was a question for the jury, and they have pronounced their opinion.

LITTLEDALE J. A stricter course is observed in the case of a bill of exchange or promissory-note than in that of cheques: they, it is well known, are frequently kept till they are over-due, and therefore a party taking one that is over-due does not necessarily take it at his peril, and subject to all its infirmities, as the law is with respect to bills of exchange, properly so called, and notes. The law is the same whether the amount of the cheque be ten pounds or a thousand; and cheques of a small amount are commonly paid away after they are over-due.

PARKE J. having been engaged in the cause while at the bar, gave no opinion.

Rule refused. (a)

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(a) See *Slater v. West*, *ante*, p. 15., and the note appended to that case.

FORGED ACCEPTANCE PAID UNDER MISTAKE.

In the KING'S BENCH.—Sittings in Banc after *Trinity* Term.

Cocks and Others *v.* Masterman and Others.

ASSUMPSIT to recover back a sum of money paid under a mistake of fact.

Both the plaintiffs and defendants were bankers in London. A bill of exchange, purporting to be accepted by *Sewell and Cross*, customers of the plaintiffs, was presented to them when due, and paid by them to the defendants. Early the next day it was discovered that the acceptance was a forgery; whereupon the plaintiffs immediately gave notice to all the parties on the bill, to whom notice would have been necessary in case of dishonour, and called upon the defendants to refund the money. Upon their refusal, the action was brought; and the facts above stated having appeared at the trial, were turned into a special case for the opinion of the Court.

The case was argued before Lord Tenterden C. J., *Bayley* J., and *Littledale* J., by *R. V. Richards* for the plaintiffs, and *F. Pollock* for the defendants.

A banker pays a forged acceptance of a customer. *The next day*, on discovering the forgery, he gives notice to all parties, and claims the proceeds back from the person to whom they were paid: Held, that this claim could not be sustained; the notice (which should be equivalent to notice of dishonour) being, with respect to the holder, too late.

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For the plaintiffs it was contended, that the general principle of law, that money paid under mistake of fact might be recovered back, must prevail in this case, unless there was such negligence on the part of the plaintiffs as to prejudice the rights of third parties, and such rights had in fact intervened. Here there was certainly no culpable negligence. The bill was paid in the regular course of business; and it would be hard indeed if bankers were to be required to detect, at the first glance, the spuriousness of every instrument presented to them. If ordinary care were exercised, it was all which could reasonably be required. In *Smith v. Mercer* (*a*), indeed, it was suggested that it was the duty of bankers to be acquainted with the hand-writing of their customers; but there were other grounds besides this sufficient to warrant the judgment of the Court in that case; and indeed the case itself was somewhat questioned by the Court in *Wilkinson v. Johnson*. (*b*) But even were this otherwise, such a rule could not apply in this case, because no prejudice had been sustained by third parties in consequence of the payment of the bill, and the subsequent claim of repayment. Timely notice was given to all who had rights upon the bill. If the bill had been refused payment in the first instance, no earlier notice could have been required. Upon this point, the case of *Wilkinson v. Johnson* (*c*) was decisive, where the same course having been pursued on the discovery of the forgery, the Court held that the money paid might be recovered back.

For the defendants it was answered, that there was negligence on the part of the plaintiffs sufficient to defeat their claim; that every banker was bound to

(*a*) 6 Taunt. 76.(*b*) 5 B. & C. 437.(*c*) Ibid. 438.

know the hand-writing of his customer, and it was at his peril that he gave credit to a signature not in his hand-writing, *Smith v. Mercer*; secondly, that in this case there might be prejudice to a third party from undoing the act of the plaintiffs. The discovery was not made till the following day; so that the holder, not having notice until that time, would be deprived, if the bill were now to be treated as having been refused payment when presented, of one whole day, during which time he might have taken measures to protect himself. In both these respects the case was distinguishable from *Wilkinson v. Johnson*. In that case there was no reason why the plaintiff in particular should be acquainted with the hand-writing of the parties whose names had been forged, and there was at least equal negligence on the part of the holder of the bill. Moreover, the notice there was given on the *same* day, so that no injury could possibly have been sustained by the holder.

The Court having taken time to consider, the judgment was delivered on the following day by

BAYLEY J., who, after stating the facts, proceeded thus: It is a general rule, that the party called upon to pay a bill of exchange must satisfy himself of the genuineness of the instrument at the time when he pays it. An acceptance payable at a banker's is properly a cheque, and the banker ought not to pay it without taking pains to ascertain its genuineness. But it was contended in the argument, that supposing the rule to be so, the effect of it in this case was altered by the notice given to the parties interested in the bill; and the case of *Wilkinson v. Johnson* was relied upon as an authority for that position. There are several material distinctions between that case and the present. We say nothing as to the effect of notice given on the *same* day to the party to whom payment was made,

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though we have an opinion upon that point; but we are all of opinion that the holder is entitled, on the day when the bill becomes due, to know whether it is dishonoured or not. If he be suffered to remain in ignorance during the whole of that day, notice afterwards comes too late. He might, if he chose, take steps on that day, and you cannot by laches on your part deprive him of any right which diligence on his would have given him.

Postea to the defendants.

PILOT ACT.

In the KING's BENCH.—Sittings in Banc after *Easter Term*.

STEPHENSON, Administrator of STEPHENSON deceased,
v. DIXON and Others.

A new ship made her first voyage in ballast from Carlisle to London, for the purpose of being fitted up with steam-engines, &c., with the view of being employed as a steam-vessel in the coasting trade between Carlisle and Liverpool. While proceeding up the Thames, having on board a pilot duly licensed and qualified under the pilot act (6 G. 4. c. 125.), she ran foul of and damaged another vessel. Having been fitted up, she took down a cargo to Liverpool, and was afterwards regularly employed in the coasting trade between Carlisle and Liverpool: Held, that she was not, at the time of the injury, a vessel "employed in the regular coasting trade of this kingdom," and therefore exempted by the fifty-ninth section of the pilot act from the obligation of taking on board a licensed pilot; and that, therefore, her owners were not responsible for such injury, since a licensed pilot was on board.

liability by the provisions of the pilot act, 6 G. 4. c. 125., and directed a nonsuit, subject to the opinion of the Court upon a case in substance as follows:—

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On the 8th December 1826, the *British Queen*, of which the intestate *Elizabeth Stephenson* was then sole owner, was lying at anchor in a proper situation in the river *Thames*, between *Gravesend* and *London*; when the *Cumberland*, of above sixty tons burthen, of which the defendants were then the owners, through the neglect or incapacity of the pilot acting in charge of her, ran foul of and did damage to the *British Queen* to the amount of 136*l.* The pilot was duly licensed under the 6 G. 4. c. 125., and duly qualified by his licence to take charge of vessels of the size of the *Cumberland*. The *Cumberland* was then a new vessel, on her first voyage from *Carlisle*, by *Liverpool*, to *London*, for the purpose of being fitted up with steam-engines, and being completed in other respects, with a view of being afterwards employed as a steam-vessel in the coasting trade; in which she was regularly employed between *Carlisle* and *Liverpool* from the time of her return from *London* until the month of January 1828. She sailed from *Liverpool* to *London* in ballast, and after she had been there fitted up with steam-engines, a cargo of tallow was taken on board, and she returned to *Liverpool* with the same captain and crew who sailed with her from *Liverpool* to *London*. Neither the captain nor the crew being acquainted with the navigation of the *Downs*, or of the river *Thames*, the captain took a pilot on board in the *Downs*, who navigated the vessel as far as *Gravesend*, to which place only his licence allowed him to go; and then another pilot was taken on board, who continued to have charge of the vessel at the time when she ran foul of the *British Queen*.

The questions for the opinion of the Court were, first, Whether the plaintiff, as administrator of *Elizabeth*

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Stephenson, could maintain an action for the damage done to her ship in her lifetime (*a*) ; and, secondly, Whether the defendants, under the circumstances above mentioned, were by the provisions of the 6 G. 4. c. 125. exonerated from the liability to pay for such damage. If the Court should be of opinion that the action could not be maintained, the nonsuit was to stand; if they should be of the contrary opinion, a verdict was to be entered for the plaintiff, with 136*l.* damages.

Creswell for the plaintiff. The question in the case is, Whether the owners of this vessel, the *Cumberland*, were bound by the provisions of the pilot act to take on board a licensed pilot; for if they were not, but the pilot was taken on board voluntarily, they were nevertheless responsible in this action. The second section of the 6 G. 4. c. 125. enacts, that all vessels navigating in the *British Channel* from the *Isle of Wight* up to *London Bridge* (save and except as afterwards provided), shall be conducted and piloted within those limits by pilots to be licensed by the *Trinity House* Corporation in the manner thereinbefore mentioned. The fifty-fifth section exempts the owners and masters from liability for loss or damage arising from the neglect or incapacity of any licensed pilot acting in charge of a vessel *under and in pursuance of any of the provisions of that act*, where and so long as he shall be duly qualified to have charge of the vessel. Then, by the fifty-ninth section, certain vessels, among which is "any ship or vessel employed in the regular coasting trade of this kingdom," are exempted from the obligation of taking a licensed pilot on board, so long as they are not navigated by an unlicensed pilot, or by any other person than the ordinary

(*a*) This point was not argued.

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crew of the vessel. If, therefore, the *Cumberland* was a vessel employed in the coasting trade, she was exempted from the obligation of taking a pilot; and the pilot, consequently, was not taken on board under and in pursuance of the act. The question also arises, whether the *Cumberland*, at the time of this injury, was a *perfect ship* or not; because if she was not, (and being made for steam navigation, she could scarcely be said to be so until provided with the requisite machinery,) she was not yet liable to the operation of the act: if she was liable to the operation of the act, then she was in the coasting trade. Either way, therefore, she was not bound under the act to take on board a pilot. [Bayley J. By the second section *all* vessels are to be piloted. I think she must be considered as a perfect vessel sufficiently to come within the words of that section; the only question is, whether she was within the class exempted.] Assuming, however, that she was then a perfect ship, she was at the time of the accident in the coasting trade. She took back a cargo in the course of this voyage; her trading, therefore, commenced with the commencement of this voyage, that is, when she sailed from *Carlisle* for *London*. It is clear, if she had brought up a cargo, she would have been deemed to have been in the trade; and there is no difference in effect whether she brought up a cargo and went back without one, or whether she came up without one and took one back. She was, therefore, then in the coasting trade, and it was not compulsory on the owners to take a pilot. It is unnecessary to cite the cases, which are all clear upon the point that where the pilot is taken on board voluntarily, the owners are not exonerated from liability. (a)

(a) See *Attorney-General v. Case*, 3 Price, 302. *Carruthers v. Sydebotham*, 4 M. & S. 77. Abbott on Shipping, 160.

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T. Clarkson for the defendants. First, the *Cumberland* was not a vessel employed *in the regular coasting trade of this kingdom*. Those words are explained by the 6 G. 4. c. 107. s. 100. to mean "trade by sea from any one part of the United Kingdom to any other part thereof, or from one part of the Isle of *Man* to another thereof." Before this act, the 52 G. 3. c. 39. s. 2. exempted *all coasting vessels*. The 6 G. 4. c. 125. s. 59. makes use of the words "employed in the *regular coasting trade of this kingdom*." These words appear to have been designedly substituted for the former more general words; and the alteration was necessary, because otherwise vessels sometimes employed in foreign trade, or not employed in trade at all, might claim the benefit of the exemption, although the ground of exemption, namely, that the captains and crews might be presumed to know the navigation of the *Thames*, would not apply to them. All the exceptions, too, in the fifty-ninth section speak of *trading vessels*. The words "regular coasting trade" must, therefore, be strictly construed. Now, the *Cumberland* cannot be considered as employed in any trade at the time in question; for it is stated that she was sent up in ballast, for a different purpose, viz. to be fitted up with steam-engines, and completed in other respects. The circumstance of her taking back a cargo does not appear to have been a consequence of any previous contract or order, but rather matter of accident. After she had been fitted up with steam-engines, she might have gone into the foreign trade, if the owners had changed their intention: it could not be said what was her trade until it had commenced. The act contemplates a state of actual employment. Besides, it does not appear that she was intended to trade between *Carlisle* and *London*, or that there is any regular coasting trade between those two ports. But, secondly, if she *was* in the coasting trade,

it was compulsory on her to take a pilot. The exemption given by the fifty-ninth section, is only when and so long as the owners shall conduct and pilot the ship without the aid of any unlicensed pilot, or any other person than the ordinary crew of the vessel. But here the master and crew of the vessel were ignorant of the navigation of the *Thames*; they were bound, therefore, to take on board somebody who understood it; in case the vessel had been insured, the policy would have been discharged by a neglect to do so, *Law v. Hollingworth* (a): but the act precludes them from taking any other person but a *Trinity House* pilot; the captain of the *Cumberland*, therefore, took on board a person imposed on him by the law, and acting in pursuance of the act, not his own servant; and the declaration, which states the injury to have been done by the negligence of the defendants and *their* servants, is not sustained. But, lastly, even if it were not compulsory on the *Cumberland* to take a pilot; yet having had in fact a pilot duly qualified on board, the owners are discharged from responsibility by the very general words of the fifty-fifth section.

Lord TENTERDEN C.J. I do not think the circumstance of this vessel being a new vessel, on her first voyage, would have been material, if she had been then in the coasting trade: but it does not appear that she was ever intended to trade between *Carlisle* and *London*; and she was not sent up to *London* for the purpose of trading, but for a different purpose. I think, therefore, the pilot was taken on board in pursuance of the act, and the owner was exempted from all liability arising from the accident.

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BAYLEY J. The *Cumberland* was not in any trade from the port of *Carlisle* to the port of *London*, to which she was bound. I think, therefore, she cannot be said to have been in the regular coasting trade of the kingdom within the meaning of the act.

LITTLEDALE J. I am of the same opinion. I think that the very statement in the case negatives the fact of the vessel's being in any trade from *Carlisle* to *London*, for it specifically states that she was sent up for the purpose of being fitted up with steam-engines, and completed in other respects; and the circumstance of her having taken back a cargo does not alter the case.

Postea to the defendants.

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payment of it refused. The foreign merchant, when he remitted it, was indebted to the plaintiff in a sum exceeding its amount, but the plaintiff did not make him any further advances on the credit of it. In trover for the note; Held, that the plaintiff must be considered only as the agent of the foreign merchant, and could recover only on his title:

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5. A commission issued after the passing of the new bankrupt act, 6 G. 4. c. 16., cannot be supported on a trading which had ceased before the commencement of that act. *Surtees and Others, Assignees of Marchington, v. Ellison.* Page 275

See also *Hughson v. Hurd*, page 276, and *Ex parte Brownhill*, page 277.

BILL OF EXCHANGE.

1. Where a bill was taken in payment under circumstances of slight suspicion, and in an action by the holder against the acceptor, the jury found for the defendant, on the ground that the holder had not used due caution in taking the bill, the Court refused to disturb the verdict by granting a new trial. *Slater and Others v. West.* 15
2. Acceptor of a bill of exchange is an incompetent witness on behalf of the drawer, in an action by the holder. The Court will, however, under special circumstances, grant a new trial, that he may be released. *Edmonds v. Lowe.* 88
3. A foreign bill is indorsed, "pay S. W., or order, for my use," and discounted by the indorsee at his bankers'. They apply the proceeds in the usual course of dealing to the account of the indorsee, who immediately afterwards becomes bankrupt, without accounting for the bill to the indorser: Held, that the bankers were liable to the indorser for the amount of the bill, in an action for money had and received. *Sigourney v. Loyd and Others; Loyd and Others v. Sigourney (in error).* 132. 213
4. In an action by an innocent indorsee of a bill of exchange, against

the acceptor, it is no defence that the bill was given to settle stockjobbing differences. *Greenland and Another v. Dyer.*

Page 147

5. Where the residence of a party entitled to notice of the dishonour of a bill is unknown, reasonable diligence in discovering it, and afterwards giving notice, will sustain the general averment of notice in the declaration; and where the knowledge of the residence is conveyed first to an agent of the holder, notice given two days afterwards is sufficient, the agent being allowed one day to communicate with his principal. *Firth v. Thrush.* 151
6. An offer made by a drawer of a bill, long after it was due, to pay a composition on all his debts, and not acceded to by the holder, held sufficient presumptive evidence of notice of dishonour. *Margitson v. Arthur.* 157
7. If the payee and indorsee of a bill agree, at the time of discounting, not to sue the drawer in the event of nonpayment by the acceptor, he is bound by that agreement. *Pike v. Sweet.* 159
8. It is no defence to an action by the holder, that time has been given to the acceptor since the commencement of the action. *Ibid.* 159
9. A. draws and B. accepts a bill for the accommodation of C., the first indorsee. Neither A. nor C. has any effects in the hands of B.; yet this does not supersede the necessity of notice of dishonour to the drawer from a subsequent indorsee, who was ignorant of the concoction of the bill. *Norton v. Pickering.* 210
10. When the acceptor of a bill positively refuses payment, notice of the dishonour may be given during the same day on which

the bill becomes due. *Clowes v. ——.* Page 212

11. A party taking a cheque over due, does not necessarily take it subject to all the infirmities of its previous title, if he exercise reasonable caution in taking it; and whether he has done so or not, is a question for the jury upon all the circumstances of the case. *Rothschild v. Corney and Others.* 325
12. A banker pays a forged acceptance to a customer. *The next day*, on discovering the forgery, he gives notice to all parties, and claims the proceeds back from the person to whom they were paid: Held, that the claim could not be sustained; the notice (which should be equivalent to notice of dishonour) being with respect to the holder too late. *Cocks and Others v. Masterman and Others.* 329

BILL OF LADING.

See SHIPPING, 1.

BLOCKADE.

See INSURANCE, 9, 10, 11.

BOND OF FIDELITY.

See EVIDENCE, 3. *SURETY.*

BROKER'S LIEN.

See INSURANCE, 7.

CARRIERS.

Carriers who have limited their responsibility by notice, are not liable for a loss by the robbery of their own servants, where there has been great carelessness on the part of the owner, and no

gross negligence on their part.
Bradley v. Waterhouse and Others.

Page 1

CHARTERPARTY.

1. Construction put by the Court upon a very special appointment of a master and commander, by an instrument in the nature of a charterparty. *Colvin and Others v. Newberry and Others.* 61
2. Action for money had and received by the assignees of a bankrupt charterer against the owners, as the proceeds of a cargo shipped outwards, and attached by the master in a foreign state: Held, not maintainable, the bankrupt having previously assigned the goods to others as a security for advances. *Kymer and Others, Assignees, v. Larkin and Another.* 74
3. Freight earned by a chartered vessel put up as a general ship on the homeward voyage, cannot be recovered by the charterer from the owner, in an action for money had and received. *Ibid.*

CHEQUE.

A party taking a cheque over due, does not necessarily take it subject to all the infirmities of its previous title, if he exercise reasonable caution in taking it; and whether he has done so or not, is a question for the jury, upon all the circumstances of the case. *Rothschild v. Corney and Others.* 325

COLONIAL JUDGMENT.

See FOREIGN JUDGMENT.

CONTRACT.

1. Notice to a wharfinger, given in

EVIDENCE.

the name of the vendor, but by the direction of the vendee, who was insolvent, not to deliver the goods, together with a subsequent assent to that act by the vendor, amounts to a rescinding of the sale, and revests the property in the vendor, at all events from the time of that assent. *Bartram v. Fairbrother and Another.* Page 42

2. Failure in specific performance as to time, when a forfeiture. *Carpenter v. Blandford.* 175
3. In an action for goods sold and delivered, evidence is not admissible which tends to invalidate the sale. *Ferguson and Another v. Carrington.* 198

DAMAGES, MEASURE OF.

See BANKRUPTCY, 4.

EVIDENCE.

See CONTRACT, 3. INSURANCE, 6.

1. A promissory note, which was once a valid instrument, but by reason of a subsequent unexplained erasure not available as a promissory note, is admissible in evidence on the account stated. *Bishop v. Chambre.* 83
2. Bankers' books held admissible as evidence to shew that a third party had, on a particular day, no funds in their hands. *Furness, Assignee, v. Cope.* 167
3. Books kept by a clerk in the ordinary course of his duty, may be received in evidence in an action against a surety on a bond conditioned for his fidelity, to prove the issue that certain sums had been received by the clerk. *Whitmarsh and Others v. Gends and Gifford.* 171
4. Parol evidence held to be inadmissible of the terms of a partnership, of which a rough sketch

had been made by one of the partners, and shewn to and approved of by another, though it was intended subsequently to extend it into a formal deed, and that had not been done. *Jones v. Hunter and Others.* Page 214

5. The plaintiff entered into a written agreement, unstamped, to do certain repairs in the defendant's house on specified terms. During the progress of the work, the original plan was departed from, and additional work done, not provided for by the written agreement: Held, that the plaintiff could not sue for the value even of such additional work with producing the agreement, and that, it being unstamped, he could not use it to shew that that work was not included in it. *Vincent v. Coles* (*sed qu.*). 284

EXCHANGE, RATE OF.

See FOREIGN JUDGMENT, 2.

FACTOR'S ACT.

See MERCHANT AND FACTOR.

FOREIGN JUDGMENT.

1. *Assumpsit* will lie on an equitable decree of a colonial court. *Henley v. Soper.* 38
2. If a party is sued in *England* on a judgment recovered in *Jamaica*, the amount is to be estimated at the par of exchange between *England* and *Jamaica*, and the defendant is not entitled to deduct the premium which bills on *England* bear in *Jamaica*. *Scott v. Beavan.* 301

FREIGHT.

Freight earned by a chartered vessel put up as a general ship on

the homeward voyage, cannot be recovered by the charterer from the owner, in an action for money had and received. *Kymer and Another, Assignees, v. Larkin and Another.* Page 74

GOODS BARGAINED AND SOLD.

See VENDOR AND VENDEE, 3.

GOODS SOLD AND DELIVERED.

See CONTRACT, 3.

ILLEGAL CONTRACT.

See BILL OF EXCHANGE, 4. INSOLVENT DEBTORS' ACT.

IMPLIED WARRANTY.

See VENDOR AND VENDEE, 6.

INDORSEMENT.

See BILL OF EXCHANGE, 3.

INSOLVENT DEBTORS' ACT.

An agreement by a creditor to withdraw his opposition to the discharge of an insolvent debtor, after an inquiry instituted by the Court at his instigation, is against the policy of the insolvent laws, and in fraud of the other creditors, and therefore void. *Murray v. Reeves, Gent.* 161

INSURANCE.

1. In determining whether a new ship is on her first or second voyage at the time of a loss, and therefore within the rule at *Lloyd's* for deducting one-third new for old: Held, that when evidence as to the rule was con-

- tradictory, the terms of the charter-party and policy might be taken into consideration. *Fenwick v. Robinson.* Page 8
2. A policy from *Sidney* to *Otaheite*, with leave to call at *M'Quarrie island*, and all other ports, for the purpose of *South Sea* fishing and sealing, does not cover a voyage from *Sidney* to *M'Quarrie island*, which is not in the course to *Otaheite*, in the absence of all proof of an intention to go to *Otaheite*. *Lord and Another v. Robinson.* 11
3. Valued policy — sea-worthiness. *Taylor v. South Devon Insurance Company.* 91
4. A vessel insured on a valued policy sustained an injury by perils of the sea, the repairing of which would have amounted to more than the ship so repaired would have been *really* worth, but less than the value in the policy: Held, that the assured having abandoned, might recover from the underwriters as for a total loss, according to the value in the policy. *Allan and Another, Assignees, v. Sugrue.* 188
5. Warranty to sail on or before a day certain, is not complied with by being ready to sail, and proceeding a short distance along the moorings; nor is strict performance dispensed with by an unavoidable necessity preventing it. *Nelson v. Salvador.* 219
6. What amounts to a concealment of material facts, so as to avoid a policy. The opinion of experienced persons as to what is material, is admissible in evidence. *Rickards v. Murdock and Another.* 221
7. A broker, who has effected an insurance as the agent of the assured, is bound to produce the policy on the trial of an action on it by the assured, though he have a lien upon it for premiums. *Hunter and Others v. Leathley.* Page 226
8. Insurance on goods, warranted free of particular average. The ship was laid on her beam ends by a storm, a small part of her bows only remaining above water; and the crew having abandoned her for the preservation of their lives, she was afterwards towed in the same condition by fishermen into a neighbouring port; but the goods were so much damaged by the sea-water, as to be insufficient to pay the salvage: and the crew were restrained from interfering with the ship or cargo until the claim for salvage was determined. It was also found that there was no other ship in which the goods could have been forwarded to their port of discharge; and that if there had, they would have been of no value there: Held, that the assured, having given due notice of abandonment, were entitled to recover as for a total loss. *Parry v. Aberdein.* 228
9. A policy of insurance on goods to a foreign port, was effected after notice in the *London Gazette* that that port was in a state of blockade. The ship having sailed before this notice, and been captured, with the goods on board, by the blockading squadron, for an alleged breach of the blockade: Held, that the assured, having given notice of abandonment, might recover on the policy, unless it were shown that the *captain* had notice of the blockade in the course of the voyage. *Harratt v. Wise and Others.* 234
10. If a ship, having sailed for a blockaded port before public notification of the blockade in this country, receive at any time dur-

LOAN-CONTRACTOR.

ing her voyage intelligence of the blockade, but nevertheless continue her voyage to the blockaded port, and be taken in an attempt to enter it, a policy of insurance on the ship or her cargo is discharged. *Winder v. Wise and Others.* Page 238

11. A policy of insurance on goods to a foreign port, effected after notice in the *London Gazette* that that port is in a state of blockade, though the ship also sail after such notice, is not illegal, if it be part of the agreement that inquiry shall be made as to the continuance of the blockade. *Naylor and Others v. Taylor.* 240

12. Where a ship, having insured goods on board, was captured for an alleged breach of blockade, and afterwards rescued by the British crew, who brought her back, with the goods, into an English port; and after receiving information of the capture, but before the return of the ship, and before hearing of the rescue, the assured gave notice of abandonment: Held, they were not entitled to recover on the policy as for a total loss. *Ibid.* 240

INTEREST, PAYMENT OF.

See STATUTE OF LIMITATIONS.

JOINT STOCK COMPANY.

See PARTNERSHIP, 2.

LIEN.

See INSURANCE, 7. MERCHANT AND FACTOR. SHIPPING, 2. VENDOR AND VENDEE, 4. 7.

LOAN-CONTRACTOR.

R., a loan-contractor, delivered to

MERCHANT, &c. 345

L. certain scrip receipts, purporting that *L.* had paid him 10 per cent. deposit on a certain amount of *Neapolitan* stock, and entitling the bearer to certificates for that amount of stock, on his paying the balance on a day specified. *L.* transferred these receipts to *H.* for a valuable consideration. *R.*, by public advertisement, afterwards offered, on certain conditions, an extended time for payment of the balance, and required that the receipts should be left at his office, to be marked as held under the new conditions. The receipts transferred by *L.* to *H.* were accordingly left by him at *R.*'s office, and there indorsed by *R.* with the name of *H.* *H.* having failed to comply with the conditions on which the time was extended: Held, on error, that he could not recover the deposit of 10 per cent. from *R.*, in an action for money had and received. *Rothschild v. Hennings.* Page 290

MERCHANT AND FACTOR.

1. A factor, before the 1st October 1826, pledged *East India* warrants with a banker as a security. A substitution of new bills for old took place between the factor and banker after the 1st October, and the latter claimed to retain the warrants as a security for a bill of 10,000*l.* then discounted for the factor, the cash being placed to the factor's account: Held, that this transaction was not within the second section of the 6 G. 4. c. 94. which came into operation on the 1st October 1826. *Ross and Others v. Willis and Others.* 19
2. Where a factor, under acceptances for his principal, which were provided for by the latter

before they became due, pledged documents for the delivery of goods belonging to his principal, as a security for advances: Held, that the pledgee had no right, under the second section of 4 G. 4. c. 83., and the eighth section of 6 G. 4. c. 94., to retain them against the owner. *Blandy v. Allan.* Page 22

MONEY HAD AND RECEIVED.

See BILL OF EXCHANGE, 3. CHARTERPARTY, 3. LOAN-CONTRACTOR.

MONEY PAID BY MISTAKE.

See BILL OF EXCHANGE, 12.

NOTICE OF DISHONOUR.

See BILL OF EXCHANGE, 5, 6, 9, 10, 12.

PARTNERSHIP.

1. A partner in a house in *England*, trading in *America* on the partnership account, but transacting all the business in his own name, indorses bills for partnership purposes in his own name only: Held, that on this indorsement the firm was liable. *The South Carolina Bank v. Case and Others, Assignees. Beckett and Another v. Same.* 103

2. One partner cannot sue another on account of a partnership transaction. Therefore, where a member of a company drew bills expressly on account of the company, and indorsed them to the actuary, who indorsed them over to another member of the company, for a debt due to him from the company; it was held,

that the latter could not sue the drawer on the bills, nor for money had and received, though the drawer had received from the acceptor 10s. in the pound on account of the bills. *Teague v. Hubbard.* Page 118

3. A partnership debtor is informed of the contemplated dissolution of the firm, and by agreement with the partners gives, in further security for the debt, a warrant of attorney to the single partner who was to continue the business: Held, that payments subsequently made on this warrant to the one partner must be considered as partnership payments; and that, having been made after an act of bankruptcy, the retiring partner, who had survived, was liable to the assignees in an action for money had and received. *Biggs and Others, Assignees of Collier, v. Fellows.* 121

4. If a partner of one firm collude with a partner of another, in a matter within the regular course of business between the two firms, whereby the other partners in the latter firm sustain an injury, the innocent partners of the person so colluding are liable for damages to the injured firm. *Longman and Others v. Sir P. Pole, Bart., and Others.* 126

5. Parol evidence held inadmissible of the terms of a partnership, of which a rough sketch had been made in writing by one of the partners, and shown to and approved of by another, although it was intended subsequently to extend it into a formal deed, and that had not been done. *Jones v. Hunter and Others.* 214

6. *Semblé*, that in an action against three partners, the non-liability of one who had pleaded his bankruptcy and certificate, and as to

PRINCIPAL AND AGENT.

whom a *nolle prosequi* had been entered, could not be set up as a defence by the others who were liable. *Ibid.* Page 214

PATENT.

A specification of a patent contained these words: "which cloths may be made of any suitable material, but I prefer them to be made of linen warp or woollen weft;" the fact being that no other material but these had been found to answer the purpose: Held bad, as not sufficiently accurate. *Crompton v. Ibbotson.* 33

PILOT ACT.

See SHIPPING, 3.

POLICY OF INSURANCE.

See INSURANCE.

PRIMAGE.

See SHIPPING, 1.

PRINCIPAL AND AGENT.

See MERCHANT AND FACTOR.

1. A broker sells goods for his principal, to be paid for by bill of exchange. Before the bill becomes due, the acceptor stops payment; whereupon the broker, who holds the goods as the agent for the vendee, for the purpose of reselling them, applies to the vendee, on behalf of the vendor, for further security. The vendee accordingly authorizes him to sell the goods, and apply the proceeds to the payment of the bill. The broker does not sell, in consequence of the unfavourable state of the market, but subsequently delivers over the goods to the vendor, the vendee in the

PROMISSORY NOTE. 347

meantime having committed an act of bankruptcy: Held, that the act of the broker being for the benefit of the vendor, must be presumed to have been ratified by him; and, therefore, that the order of the vendee was executed, and could not be revoked by the bankruptcy: Held, also, that the mere delivery of the goods by the broker to the vendor, no demand having been made before their re-delivery to him in the same state, was not such a conversion by either as would sustain trover. *Bailey, surviving Assignee, v. Culverwell and Others.* Page 176

2. Where a party sells goods to another, and debits him with the price, knowing that he is buying as an agent, but not knowing the principal's name, the seller may afterwards resort to the principal for the price, provided the state of account between the principal and agent be not thereby altered to the prejudice of the latter. And the seller is not bound to inquire who is the principal. *Thomson v. Davenport and Others.* 278

PROMISSORY NOTE.

See STATUTE OF LIMITATIONS.

1. A promissory note, which was once a valid instrument, but by reason of a subsequent unexplained erasure not available as a promissory note, is admissible in evidence on the account stated. *Bishop v. Chambre.* 83
2. A promissory note payable to *A. B. or order, on demand,* is not within the second class described in the schedule to the stamp act. *Moyser and Another, Assignees, v. Whitaker. Armitage v. Berry.* 216. 218
3. A Bank of England note, which

was stolen in *England* in February 1826, was remitted, in May 1827, by a merchant in *Paris* to the plaintiff, his correspondent in *London*. On his presenting it at the Bank, it was stopped as a stolen note, and payment of it refused. The foreign merchant, when he remitted it, was indebted to the plaintiff in a sum exceeding its amount; but the plaintiff did not before its stoppage make him any further advance on the credit of it. In trover for the note: Held, that the plaintiff must be considered as the agent of the foreign merchant, and could recover only on his title; Held, secondly, that the plaintiff was bound to show that the foreign merchant gave such value for it as to exempt him from all suspicion of knowing that it had been improperly obtained.

Qu. Whether a promissory note made in *England* is transferable by indorsement or delivery abroad. *De La Chaumette v. Bank of England.* Page 318

RESCISSIION OF CONTRACT.

See BANKRUPTCY, 4. CONTRACT, 1.

SEA-WORTHINESS.

See INSURANCE, 3.

SHIPPING.

See CHARTERPARTY. FREIGHT. INSURANCE, 1.

1. A bill of lading contained the usual words "on payment of freight as per charterparty, together with *primage* and *average accustomed*:" Held, that the master had a *prima facie* claim upon this bill against the freighter for *primage*, and that it lay on

the latter to show that there was a contract excluding that claim. *Best v. Saunders.* Page 183

2. A part owner of a ship is not entitled to his share of the ship's earnings, until he has paid his proportion of the outfit and expenditure for the voyage; and a part delivery of his share does not necessarily defeat the lien which the other part owners have upon the remainder. *Holderness and Another, Assignees of Foxton, v. Shackells.* 203
3. A new ship made her first voyage in ballast from *Carlisle* to *London*, for the purpose of being fitted up with steam-engines, &c. with the view of being employed as a steam-vessel in the coasting trade between *Carlisle* and *Liverpool*. While proceeding up the *Thames*, having on board a pilot duly licensed and qualified under the pilot act, 6 G. 4. c. 125., she ran foul of and damaged another vessel. Having been fitted up, she took down a cargo to *Liverpool*, and was afterwards regularly employed in the coasting trade between *Carlisle* and *Liverpool*. Held, that she was not, at the time of the injury, a vessel "employed in the regular coasting trade of this kingdom," and therefore exempted by the fifty-ninth section of the pilot act from the obligation of taking on board a licensed pilot; and that, therefore, her owners were not responsible for such injury, since a licensed pilot was on board. *Stephenson, Administrator, v. Dixon and Others.* 392

1. Where the *primary* object of an agreement is the sale of goods, the introduction of other matter connected with the sale does

STATUTE OF LIMITATIONS. VENDOR AND VENDEE. 349

- not render a stamp necessary. An agreement, therefore, for the sale of a ship, and for procuring her to be chartered (the object of the parties being to earn freight in payment of the price); held to be within the exemption in favour of agreements "for or relating to the sale of goods." *Tooke v. Merring.* Page 35
2. A promissory note payable to *A. B. or order on demand*, is not within the second class described in the schedule to the stamp act. *Moyer and Another, Assignees, v. Whitaker. Armitage v. Berry.* 216. 218.
3. The plaintiff entered into a written agreement, unstamped, to do certain repairs in the defendant's house on specified terms. During the progress of the work the original plan was departed from, and additional work was done, not provided for by the written agreement. Held, that the plaintiff could not sue for the value even of such additional work without producing the agreement, and that, it being stamped, he could not use it to show that that work was not included in it. *Vincent v. Coles.* 284
4. A jury cannot be permitted to look at an unstamped instrument, in order to assist them in drawing a conclusion of fact. *Sweeting v. Hulse.* 287

STATUTE OF LIMITATIONS.

In an action upon a joint and several promissory note against the representative of the surety, payment of interest by the principal within six years, and during the lifetime of the surety, is evidence of a joint and several promise to pay on the part of the surety, so as to take the case out of the statute of limitations, although

in such action the note is necessarily treated as a separate note. *Burleigh, Executor, v. Platt, Administratrix of Stott.* Page 53

STOCKJOBING ACT.

See BILL OF EXCHANGE, 4.

SURETY.

See EVIDENCE, 2. STATUTE OF LIMITATIONS.

A surety to a bond conditioned for the fidelity of a clerk or other person holding a situation of trust, cannot discharge himself from liability by giving notice to the obligee. *Calvert and Another v. Gordon, Executrix.* 173

TOTAL LOSS.

See INSURANCE, 4. 8. 12.

TROVER.

See PRINCIPAL AND AGENT, 1.

UNSTAMPED INSTRUMENT.

See STAMP, 3, 4.

VALUED POLICY.

See INSURANCE, 3, 4.

VENDOR AND VENDEE.

1. When goods are bought for export, at a port from which goods are ordinarily shipped, if the seller send them to a neighbouring port, he is liable for any loss which may take place up to the time of the shipment from the latter port. *Ullock and Others v. Reddelein.* 6
2. Notice to a wharfinger, given in the name of the vendor, but by the direction of the vendee, who was insolvent, not to deliver the

goods, together with a subsequent assent to that act by the vendor, amounts to a rescinding of the sale, and reverts the property in the vendor, at all events from the time of that assent.
Bartram v. Fairbrother and Another.

Page 42

3. An action for goods bargained and sold cannot be maintained, unless there has been a specific appropriation of the particular goods, assented to by the buyer. Nor an action for work and labour, unless the article on which it is bestowed is the property of the person who orders it. *Atkinson and Others, Assignees, v. Bell and Others.* 98
4. The buyer of goods agrees to leave them in the warehouse of the seller, paying a certain rent for the room: Held, that upon the dishonour of a bill given, according to the bargain, in payment, the seller, who had still the goods in his warehouse, had a right to retain them until payment of the price. *New v. Swain.* 193

5. Where a party sells goods to another and debits him with the price, knowing that he is buying as an agent, but not knowing the principal's name, the seller may afterwards resort to the principal for the price, provided the state of account between the principal and agent be not thereby altered to the prejudice of the latter. And the seller is not bound to inquire who is the principal.
Thomson v. Davenport and Others. 278

6. Where an article is sold by a manufacturer expressly for a particular purpose, there is an implied warranty to the purchaser that the article shall be reasonably fit for that purpose, or at all events against latent defects arising from want of skill or care in the process of manufacturing. Quære, where the seller is not the manufacturer. *Jones v. Bright and Others.* Page 304
7. A. buys two pipes of wine in bond. The agent of the seller gives him a delivery note, upon which one pipe is subsequently delivered to his order, the other remaining in the bonded warehouse at a rent charged to A. He having become bankrupt, his assignees claim that pipe on payment of the warehouse rent: Held, that the seller had a right to retain it until the duties advanced upon it were repaid him. *Winks and Another, Assignees of White, v. Hassall and Another.* 312

WARRANTY.

See INSURANCE, 5.

WITNESS.

Acceptor of a bill of exchange is an incompetent witness on behalf of the drawer, in an action by the holder. The Court, however, will, under special circumstances, grant a new trial, that he may be released. *Edmonds v. Lowe.* 88

WORK AND LABOUR.

See VENDOR AND VENDEE, 3.

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